87-1685

No. ____________________

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

SHELL OIL COMPANY,
Petitioner,

vs.

CITY OF SANTA MONICA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The questions presented in this case involve a clash between national interests (the free flow of commerce guaranteed by the Commerce Clause) and local interests (the desire to maximize revenues by charging maximum fees for the use of governmentally controlled transportation facilities). In the context of pipelines, these issues were last considered by this Court in *Western Oil and Gas Association v. Cory*, 726 F.2d 1340, 1342 (9th Cir. 1984) *aff'd per curiam* by equally divided Court 471 U.S. 81, 85 L.Ed.2d 61, 105 S.Ct. 1859 (1985). More precisely, the questions here presented are:

1. Pursuant to a franchise issued under applicable state and local laws, an 82-mile pipeline which is part of a network carrying oil in interstate commerce from the Outer Continental Shelf to refineries onshore, passes for 3.9 miles through a city located in an intensely urbanized area. The City does not own its streets in fee but, instead, holds easements for street purposes. For the last 40 years, in order to pass through the City, the pipeline has utilized the subsurface of the City streets. Does the Commerce Clause prevent the City from refusing to renew the franchise unless the pipeline operator agrees to pay a user fee based neither on the cost to the City of services furnished the pipeline nor the market value of the streets but, instead, based entirely on the value of privately owned lands abutting the streets?
2. On a per-mile basis, the franchise fee demanded of the pipeline by the City is 59 times greater than the amount the City charges the local gas company for pipeline use of the streets to deliver natural gas to local inhabitants. However, there is no other *oil* pipeline in the City. Is the court of appeals correct in concluding that the

Commerce Clause does not prohibit discrimination in user fees unless the commodity carried by the local pipeline is also oil?

3. There is no evidence in the record that buildable lands abutting the streets are comparable in value to nonbuildable lands in the streets but, assuming *arguendo* that such evidence might be proffered by the City, should not the issue of the market value of the streets be decided only after a trial on the merits and not on summary judgment?

LIST PURSUANT TO SUPREME COURT RULE 28.1

Shell Oil Company is a wholly-owned subsidiary of Shell Petroleum Inc., a Delaware corporation. The voting shares of Shell Petroleum Inc. are owned, directly or indirectly, 60% by Royal Dutch Petroleum Company, The Hague, The Netherlands, and 40% by The "Shell" Transport and Trading Company, p.l.c., London, England. Royal Dutch Petroleum Company and The "Shell" Transport and Trading Company, p.l.c. are holding companies which together directly or indirectly own securities of companies in the Royal Dutch/Shell Group, the members of which are severally engaged throughout the greater part of the world in one or more phases of the oil, chemical, coal, nuclear energy and metals industries. The following list names the companies in which Shell Oil Company, or each of its subsidiaries, has an ownership interest.

A. SHELL OIL COMPANY

Subsidiary Companies

Ind/Ag Chemicals, Inc.
Pecten Arabian Company
Pecten Cameroon LNG Limited
Pecten Chemicals Inc.
Pecten Export Corporation
Pecten Middle East Services Company
Pecten Trading Company
Pecten Ventures Limited
Pecten Vietnam Company
SES, Incorporated
Shell Agricultural Chemical Company
Shell Capital, Inc.
Shell Communications, Inc.
Scallop Corporation
Shell Credit, Inc.

A. **SHELL OIL COMPANY** (Cont'd)

Subsidiary Companies (Cont'd)

Shell Energy Resources Inc.
Shell Export Company
Shell Investment, Inc.
Shell Motorist Club, Inc.
Shell Pipe Line Corporation
Shell Polymers and Catalysts Enterprises Inc.
Triton Biosciences Inc.
Western Farm Services, Inc.

Affiliated Companies

Fractionation Research, Inc.
Gravcap, Inc.
Heat Transfer Research, Inc.
Inland Corporation
Loop, Inc.
Lucky Chance Mining Company, Inc.
Mesbic Financial Corporation of Houston
Oil Companies Institute for Marine Pollution Compensation Limited
Oil Insurance Limited

B. **SHELL CREDIT, INC.**

Subsidiary Companies

Shell Finance Company
Shell Leasing Company

C. **SHELL ENERGY RESOURCES INC.**

Subsidiary Companies

Pecten International Company
Shell Gas Pipeline Company
Shell Gas Trading Company
Shell Mining Company
Shell Offshore Inc.
Shell Western E&P Inc.
Scallop Coal Corporation

D. **PECTEN INTERNATIONAL COMPANY**

Subsidiary Companies

Pecten Argentina Company
Pecten Ash Sham Company
Pecten Bahamas Company
Pecten Belize Company
Pecten Brazil Alagoas Company
Pecten Brazil Alagoas Petroleum Company
Pecten Brazil Amazon Company
Pecten Brazil Amazon Exploration Company
Pecten Brazil Amazon Exploration and Development Company
Pecten Brazil Amazon Petroleum Company
Pecten Brazil Bahia Company
Pecten Brazil Bahia Exploration Company
Pecten Brazil Bahia Exploration and Development Company
Pecten Brazil Bahia Petroleum Company
Pecten Brazil Exploration Company
Pecten Brazil Maranhao Company
Pecten Brazil Maranhao Exploration Company
Pecten Brazil Petroleum Company
Pecten Brazil Rio Grande Do Norte Company
Pecten Cameroon Company
Pecten Canada Limited
Pecten Ecuador Company

D. **PECTEN INTERNATIONAL COMPANY** (Cont'd)

Subsidiary Companies (Cont'd)

Pecten Guinea-Bissau Company
Pecten Malaysia Company
Pecten Malaysia Petroleum Company
Pecten Orient Company
Pecten Overseas Petroleum Company
Pecten Paraguay Company
Pecten Portugal Company S.A.R.L.
Pecten Potiguar Company
Pecten Santos Company
Pecten Santos Exploration Company
Pecten Santos Petroleum Company
Pecten Sarawak Company
Pecten Syria Company
Pecten Syria Petroleum Company
Pecten Tanzania Company
Pecten Tunisia Company
Pecten Victoria Company
Taranaki Offshore Petroleum Company

E. **SHELL MINING COMPANY**

Subsidiary Companies

Bellaire Trucking Company
Pecten Coal International Inc.
R. & F. Coal Company
Triton Coal Company
Turris Coal Company
Billiton Metals Inc.
Billiton Minerals U.S.A. Inc.

F. **SHELL OFFSHORE INC.**

Subsidiary Company

SOI Royalties Inc.

G. **SHELL WESTERN E&P INC.**

Subsidiary Companies

Belridge Farms
Belridge Packing Co.
Chaparro Gathering Co.
Choctaw Pipe Line Company
SWEPI Royalties Inc.
Shell California Offshore Pipeline Inc.
Shell Cortez Pipeline Company
Shell Western Pipelines Inc.

Affiliated Companies

East Texas Salt Water Disposal Company
Grande Ecallie Land Company, Inc.
Thums Long Beach Company
Van Salt Water Disposal Company
WIDC (Wyoming Industrial Development Corporation)

H. **SHELL CORTEZ PIPELINE COMPANY**

Affiliated Company

Cortez Capital Corporation

I. **PECTEN ARABIAN COMPANY**

Subsidiary Company

Pico Limited

J. **TARANAKI OFFSHORE PETROLEUM COMPANY**

Subsidiary Company

Taranaki Offshore Petroleum Company Limited

K. **SHELL CHEMICAL COMPANY**
(a division of Shell Oil Company)

Affiliated Companies

George Newman & Company
United Scientific, Inc.

L. **PECTEN TRADING COMPANY**

Affiliated Company

Oil Companies Institute for Marine Pollution Compensation Limited

M. **WESTERN FARM SERVICES, INC.**

Subsidiary Company

Pioneer Equipment Co.

N. **SHELL PIPE LINE CORPORATION**

Subsidiary Companies

Butte Pipe Line Company
San Joaquin Valley Pipe Line Company

Affiliated Companies

Dixie Pipeline Company
Explorer Pipeline Company
Locap, Inc.
Olympic Pipe Line Company
Plantation Pipe Line Company
West Shore Pipe Line Company
Wolverine Pipe Line Company

O. **SHELL POLYMERS AND CATALYSTS ENTERPRISES INC.**

Subsidiary Companies

Ardyne Inc.
CRI Ventures, Inc.
Morrison Molded Fiber Glass Company
Premix/Ems Inc.
Quazite Corporation
Rampart Packaging Inc.
Xerkon Inc.

P. **MORRISON MOLDED FIBER GLASS COMPANY**

Subsidiary Companies

AFC, Inc.
Glastrusions, Inc.
Glass-Steel, Inc.

Q. **SCALLOP COAL CORPORATION**

Subsidiary Companies

Justin Coal Corporation
Marrowbone Development Company
Wolf Creek Collieries Company
Shell Coal and Terminal Company

R. **BILLITON METALS INC.**

Subsidiary Company

Billiton Commodities Inc.

S. **SCALLOP CORPORATION**

Subsidiary Companies

AP Shipping Corporation
Argus Realty Services Inc.
Asiatic Petroleum Corporation
Greater New York Terminal, Inc.
Houston Fuel Oil Terminal, Inc.
Nickerson American Plant Breeders Inc.
Royal Lubricants Company, Inc.
Scallop Liquified Natural Gas, Inc.

T. **MARROWBONE DEVELOPMENT COMPANY**

Subsidiary Company

Big Beaver Coal Company

U. **SHELL COAL AND TERMINAL COMPANY**

Subsidiary Companies

Clipper Coal Corporation
Comcoal Corporation
East Kentucky Energy Corporation
Kermit Coal Company
Pike County Coal Corporation
Redbone Coal Company, Inc.
Shipyard River Coal Terminal Company
SLT Corporation
Sunset Coal Corporation
Tug River Mining Group, Inc.

V. **SHIPYARD RIVER COAL TERMINAL COMPANY**

Subsidiary Company

Cooper River Coal Terminal Company

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No. ____________

IN THE

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October Term, 1987

SHELL OIL COMPANY,
Petitioner,
vs.
CITY OF SANTA MONICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI

The petitioner Shell Oil Company, a corporation, most respectfully prays that a Writ of Certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Ninth Circuit entered in the above-entitled proceedings on October 21, 1987.

OPINIONS BELOW

The Opinion of the Court of Appeals for the Ninth Circuit is reported at 830 F.2d 1052 (9th Cir. 1987) and is reprinted as Appendix A hereto; the Ninth Circuit's order denying rehearing is reprinted as Appendix C.

The Memorandum of Decision and Order of the United States District Court for the Central District of California (Honorable Robert J. Kelleher, D.J.) has not been reported. It is reprinted as Appendix B hereto; the district court's judgment is reprinted as Appendix D.

JURISDICTION

The Court of Appeals for the Ninth Circuit's judgment was entered on October 21, 1987 affirming that portion of the district court's decision dated June 13, 1986, which is the subject of this petition. On January 11, 1988, the court of appeals denied a timely petition for rehearing and rejected petitioner's suggestion of the appropriateness of a rehearing in banc. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

There are two provisions of the United States Constitution which are relevant to the issues raised in this case. They are:

1. The Commerce Clause, art. I., § 8, cl. 3:

   "The Congress shall have Power . . . to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; . . . ."

2. The Supremecy Clause, art. VI, § 2:

   "This Constitution . . . shall be the supreme Law of the Land . . . ."

STATEMENT OF THE CASE

A. Jurisdiction In The District Court:

Jurisdiction in the district court was based on both diversity of citizenship (28 U.S.C. § 1332) and on the court's federal question jurisdiction (28 U.S.C. § 1331) based on an actual controversy between the parties relating to the interpretation of the Commerce Clause, art. I, § 8, cl.

3 of the United States Constitution, as well as the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. C.R.1.

B. Facts and Procedural Posture:

For more than 40 years, Shell Oil Company and its predecessor corporations have owned and operated a 10-inch diameter crude oil pipeline which receives crude oil traveling in interstate commerce and transports that oil from Ventura County, California to Shell's Wilmington Refinery located in Los Angeles County, California and to at least one non-Shell owned refinery in Southern California. C.R. 1:2, 2:2, 80:44. The total length of the pipeline is approximately 82.2 miles. C.R. 1:2, 2:2.

For approximately 3.9 miles, the pipeline passes through the City of Santa Monica, within the public streets. C.R. 1:2, 2:2. The City of Santa Monica does not own the streets in fee but instead only holds an easement for street purposes. C.R. 80:52. The streets through which the pipeline runs are lined with homes, apartments, businesses and light industry. C.R. 78:78.

Permission to locate and operate the pipeline within public streets in Santa Monica was originally granted to Shell's predecessor corporation by the City in a franchise dated May 28, 1941. C.R. 1:3, 2:2. The franchise expired May 28, 1981. C.R. 1:3, 2:2. Since that time, the pipeline has been operated under a temporary interim franchise as discussed in more detail below.

Although at one time the pipeline transported approximately 23,700 barrels of crude oil per day (C.R. 1:3, C.R. 77:39), in the last quarter of 1985 the pipeline transported approximately 32,862 barrels of crude oil per day, approximately 89% of which was delivered to Shell's Wilmington Refinery. C.R. 80:43-44. Approximately forty-

five percent of the oil presently carried by the pipeline comes from federal leases on the Outer Continental Shelf outside the State of California. The balance of the oil carried by the pipeline is produced in California. C.R. 80:44.

The Shell Wilmington Refinery manufactures the crude oil it receives from the pipeline into transportation fuels and other products, some of which are consumed in California and some of which are consumed outside California. C.R. 80:39, 41-42.

In the event that the flow of oil from the pipeline were cut off, Shell would do its best to find alternative supplies, but there is no reliable alternative supply of oil currently available to the company. C.R. 80:45-47. In the event Shell is required to relocate the line outside the City, it would cost approximately $2,500,000, plus right of way acquisition costs. C.R. 80:66. If Shell tried to replace the current throughput of the pipeline with trucks, approximately 170 tanker trucks per day would have to travel the surface roads between Ventura and Wilmington to transport the oil. This would result in a cost increase of approximately $1.36 per barrel. C.R. 80:45-46. Furthermore, shipping the oil from Ventura to Wilmington by barge or marine tanker is not feasible as a practical matter. C.R. 80:46-47. It is fair to conclude that not only would a shutdown of the pipeline adversely affect the commerce reflected by the Los Angeles area refineries' need for oil, but so would it adversely affect (a) the commerce reflected by refinery employees and subcontractors and by the distributors and consumers of refined products on the Wilmington end of the pipeline, as well as (b) the commerce reflected by the producers of oil and their employees and subcontractors at the Ventura end of the pipeline and (c) the commerce reflected by the sellers, distributors and users of the refined products outside of California.

The pipeline is not the only user of the subsurface of Santa Monica's streets. In 1981, the Southern California Gas Company paid the City $1,004.52 per mile of pipeline under its franchise for use of the public streets for gas distribution mains. Similarly, Southern California Edison Company paid $1,516.71 per mile for its use of the public streets for power lines. C.R. 80:54-55.

With the expiration of the 1941 franchise, negotiations were undertaken respecting a renewal franchise. An appraiser hired by the City to express an opinion of the reasonable value of the franchise through the streets for negotiating purposes determined that there was no relevant market for city streets because they were not normally bought and sold. He therefore valued the right of way with respect to the replacement cost of city streets using adjacent surface land values, concluding the value to be $474,000 per year with escalations in future years, assuming a ten-foot right of way. Shell's appraiser hired for the same purpose used a different appraisal method. He valued the right of way with respect to similar oil pipeline franchise fees paid to other cities. He concluded the value was approximately $10,000 per year. C.R. 78:80.

Ultimately the City proposed a franchise fee of approximately $237,000 per year predicated on the $474,000 per year value but assuming a five-foot right of way rather than a ten-foot right of way. C.R. 1:4, 2:3, 92:24-25, 78:80. In addition, the City demanded that the franchise include numerous detailed safety regulations. Shell proposed a franchise fee of $10,000 per year and argued that no safety regulations could be included because such regulations had been preempted on both the federal and state level by the federal Hazardous Liquid Pipeline Safety Act (49 U.S.C. §§ 2001-2014) and the California Pipeline Safety Act (Cal. Govt. Code §§ 5101, *et seq.*). C.R. 78:80.

The parties were unable to reach agreement. Shell then brought an action seeking a declaration that under the Commerce Clause of the United States Constitution and comparable provisions of the California Constitution, the City of Santa Monica may not require Shell to pay a renewal franchise fee for pipeline use of the public streets which is greater than an amount which would (a) reimburse the City for the cost of any services furnished by it in connection with the operation of the pipeline and (b) compensate the City for the reasonable value of any rights the City would surrender to Shell under the renewal franchise. Shell also sought a declaration that the franchise renewal fee demanded by the City is greater than the fee charged by other users of the subsurface of public streets and, therefore, constitutes unlawful discrimination under the Commerce Clause as well as the Equal Protection Clause of the United States Constitution and comparable provisions of the California Constitution. In addition, Shell sought a declaration that the renewal franchise could contain no safety regulations, the question of safety having been preempted at the federal and state levels. Lastly, Shell sought appropriate injunctive relief. The City answered denying Shell's allegations. C.R. 1:1-13, C.R. 2:1-6.

The City and Shell each filed cross motions for summary judgment regarding the validity of the franchise fee.[1] The City contended that the Commerce Clause did not apply to the proposed franchise fee primarily because the City acts as a "market participant" immune from Commerce Clause scrutiny when it sets such fees. Shell asserted that the City was not immune from Commerce Clause scrutiny and that the proposed fee was invalid because the fee exceeded the

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[1] The cross motions also raised the validity of the safety regulations but those issues are not involved in this Petition.

constitutional limitations on such user fees and discriminated against interstate commerce.

In its Statement of Genuine Issues of Facts filed in the district court on February 8, 1986 (C.R. 79, reprinted as Appendix E hereto), Shell stated that only one genuine issue of fact remained for trial:

> "What is the maximum amount of a fee which would (a) reimburse the City of Santa Monica for the cost of any services furnished by it in connection with the operation of the pipeline, and (b) compensate the City for the reasonable value of any rights the City would surrender to Shell under the renewal franchise?"

In its Statement of Genuine Issues of Material Fact dated March 24, 1986, the City of Santa Monica contended that under its theory of the case, there were no genuine issues of material fact to be tried but then proceeded to submit a number of alleged genuine issues of material fact remaining to be tried in the event the City's theory of the case did not prevail. C.R. 88, reprinted as Appendix F hereto. Among those genuine issues of fact is the following:

> "What amount reflects the fair market value of the subject right-of-way."

As to the franchise fee issue, the district court did adopt the City of Santa Monica's theory of the case and entered summary judgment in favor of the City.[2] The district court held that the City is a market participant, immune from Commerce Clause scrutiny and may refuse to deal with Shell on pipeline franchises. Because it can refuse to deal with Shell, the City may, as an alternative, charge Shell

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[2] On the safety regulations, the district court adopted Shell's theory of the case and concluded that safety had been preempted and thus the franchise could contain no safety regulations.

whatever the City wishes. In addition, the court held that the proposed franchise fee was not a "user fee" and, thus, *Western Oil and Gas Association v. Cory*, 726 F.2d 1340, 1342 (9th Cir. 1984) aff'd. *per curiam* by equally divided Court, 471 U.S. 81, 85 L.Ed.2d 61, 105 S.Ct. 1859 (1985) does not apply. Instead, the district court concluded the fee was a "tax" and was valid under the authority of *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 69 L.Ed.2d 884, 101 S.Ct. 2946 (1981).

By accepting the City's theory of the case, the district court never reached the question of the reasonable value of the City streets or the value of the right of way. Those, of course, are issues which both the City of Santa Monica and Shell Oil Company had identified as issues to be tried if the City's theory of the case was rejected. There never was any evidence introduced on the value issue other than a declaration by the Santa Monica City Manager describing the course of negotiations between the parties which included a brief recital of the respective positions taken by the City's appraiser and Shell's appraiser (C.R. 78:80) and the City's Proposed Statement of Uncontroverted Facts, in which the City conceded as follows:

> "16. During the renewal negotiations, each party obtained . . . an appraisal of the value of the right of way from its own appraiser.
>
> "17. The parties' appraisers applied different valuation theories, and they reached disparate conclusions as to the value of the right of way." C.R. 77:39.

There was no evidence offered that the value of adjacent surface land values (which, of course, are values for buildable or built-upon lands) are comparable to the values of lands in the city streets (which, of course, are values for restricted and thus nonbuildable lands). Similarly, there was

never any trial whatsoever on the valuation issue. Counsel for the City will certainly confirm these facts if asked.

The petitioner then took a timely appeal to the Ninth Circuit from that portion of the district court's judgment which granted the City's motion for summary judgment on the fee issue.[3]

The case was argued and submitted on May 5, 1987. On October 21, 1987, the court filed its opinion authored by Circuit Judge Nelson, joined in by Circuit Judge Pregerson and accompanied by a separate concurring opinion by Circuit Judge Wiggins. The opinion is reported as *Shell Oil Co. v. City of Santa Monica,* 830 F.2d 1052 (9th Cir. 1987). Although the Ninth Circuit *rejected* the City's theory of the case on the user fee issue, it nevertheless affirmed the trial court's summary judgment.

The majority opinion first considered whether the franchise fee was subject to Commerce Clause scrutiny. In doing so, the court necessarily addressed the "market participant" doctrine relied upon by the district court and concluded the rules stated in its decision in *Western Oil and Gas Association v. Cory,* 726 F.2d 1340 (9th Cir. 1984) aff'd. *per curiam* by an equally divided Court, 471 U.S. 81 (1985) were applicable. The Ninth Circuit reasoned that although the State of California in *Cory* had a stronger monopoly position with respect to pipeline routes over State tidelands than the City of Santa Monica has with respect to pipeline routes through city streets, nevertheless the lands in question are held by the City of Santa Monica in its sovereign capacity and are recognized transportation corridors for commerce. Because restrictions on publicly controlled transportation corridors raise the dormant

[3] Similarly, the City of Santa Monica took an appeal to the Ninth Circuit from that portion of the judgment granting Shell's motion for summary judgment on the safety regulation issue.

Commerce Clause concerns for impediments to the free flow of commerce, the City of Santa Monica was *not* a "market participant" with respect to those publicly controlled transportation corridors.[4]

Having concluded that the City's franchise fee was subject to Commerce Clause scrutiny, the Ninth Circuit then turned its attention to whether the proposed franchise fee violated the Commerce Clause. First, the Ninth Circuit dismissed Shell's argument that the franchise fee discriminated against interstate commerce. The court reasoned that because Shell is the only *oil* pipeline which passes through the City of Santa Monica, the City did not and, indeed, could not have treated any local oil pipeline operator preferentially to Shell. The court concluded that any discrimination in favor of local natural gas pipelines and local electrical lines could not be considered. On that basis, the court concluded that, as a matter of law, there could be no discrimination against interstate commerce.[5]

Next, the Ninth Circuit agreed with Shell's characterization of the proposed franchise fee as a "user fee" or "rent" as opposed to a "tax." It acknowledged that traditionally user fees have only been upheld if they bear a reasonable relationship to the value of the benefits conferred by the governmental entity. The Ninth Circuit then purported to

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[4] The court carefully restricted its opinion to lands held in the City's sovereign capacity and expressed no opinion on lands that the City might hold in other capacities.

[5] The court also noted that there might be perfectly justifiable reasons for any discrimination such as differing safety considerations and differing property value levels at the time of franchising which could explain the difference in franchise fees. 830 F.2d at 1058-1059, n.7. This is, of course, a factual issue upon which no trial was ever held and on which no factual findings were made by the district court. Indeed, the only evidence in the record suggests that oil pipelines are safer than gas pipelines. C.R. 80:71-73.

apply this user fee test to the decision reached by the district court. The court of appeals apparently concluded that the district court had found the franchise fee to be a reasonable sum not disproportionate to the benefits conferred.[6] On that basis, the Ninth Circuit affirmed. At page 100 of 830 F.2d., the court declared as follows:

> ". . . We agree with the district court that *Cory's* user fee analysis does not require invalidation of the proposed franchise fee because the fee was valued according to a reasonable percentage of the appraised value of land abutting the pipeline within the city. Because Santa Monica's fee is based on an evenhanded formula and not graduated by the amount of business done, it is not a 'customs duty' on goods passing through its jurisdiction like the volumetric charge held invalid in *Cory*. Shell does not dispute Santa Monica's contention that the proposed franchise fee was based on an appraisal of 50% of the property value of the abutting land, capitalized at an annual rate of 12.5%.
>
> "As in *Cory*, we are unable to conclude that this valuation is ' "manifestly disproportionate to the services rendered." ' *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 621-22 & n.12, 101 S.Ct. 2946, 2955-56 and n. 12, 69 L.Ed. 2d 884 (1981) (quoting *Clark*, 306 U.S. at 599, 59 S.Ct. at 753). We conclude that Shell has not met its burden at summary judgment of showing that Santa Monica has discriminated against interstate commerce.

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[6] To this extent, Shell contends the court of appeals was under a serious misapprehension of fact. No such finding was ever made by the trial court.

> Accordingly, we affirm the district court's grant of summary judgment."

In a concurring opinion, Judge Wiggins concluded that while the City of Santa Monica's franchise fee was an "ominous form of overreaching" the result of which would be a "Balkanization" of the economy, there was nothing the courts could do to meet the danger. It must be left to Congress to lift "the resultant burden to commerce." 830 F.2d at 1066-1067. Judge Wiggins' words are as follows:

> "This case is narrow in its reasoning, as it should be. But it also sounds a clarion call to Congress for action. It is true that Congress has not prevented the disruption of interstate traffic in petroleum products which Santa Monica's imposition of rent, if it were emulated by every municipality on the pipeline's course, presents. The only check on this ominous form of overreaching by local authorities against politically unpopular enterprises, such as oil producers, is the vague notion of proportionality of rent to services provided by the city. Santa Monica did not, I agree, cross the line in this case. But I do have my doubts whether this decision addresses an invitation to like-situated localities in California (or Nevada and Alaska, for that matter), to press the limits of proportionality, and enter the realm of confiscation. Besides increasing prices to consumers of gasoline, the result of all this will be the 'Balkanization' of the economy. This is more than a quaint and picturesque phrase describing a hypothetical danger. The Supreme Court intended it as a warning to deter the states from interfering in the national economy. *Hughes v. Oklahoma,* 441 U.S. 322, 325-26, 99 S.Ct. 1727, 1730-31, 60 L.Ed.2d 250 (1979). The danger of

exorbitant rents on oil pipeline traffic and the resultant burden to commerce cannot be met in this court; it must be answered by Congress."

In addition, the Ninth Circuit reversed that portion of the trial court's decision holding that the question of preemption of safety regulations under the Federal Hazardous Liquid Pipeline Safety Act depended upon factual issues which must be determined at trial. The court then remanded for further proceedings. That ruling by the court is not at issue in this petition for writ of certiorari.

On November 4, 1987, Shell filed a Petition for Rehearing and Suggestion of Appropriateness of Rehearing In Banc. The Petition argued that the court was under a misapprehension of fact, believing that the trial court had made a finding that the $59,000 per mile fee was reasonable when, in fact, the trial court had made no such finding. Furthermore, Shell argued, even if the trial court had wanted to make such a finding, it could not properly have done so without a trial on the merits. On January 11, 1988, the Ninth Circuit denied the Petition for Rehearing and rejected the suggestion for rehearing in banc without comment (Appendix C).

REASONS FOR GRANTING THE WRIT

I.

The Ninth Circuit's Decision Conflicts With Decisions Of This Court And Another Federal Court Of Appeals Because It Approves User Fees Based On Values Of Land Abutting The Right Of Way Rather Than The Cost To The City Of Services Furnished Or The Market Value Of The Right Of Way.

The Ninth Circuit's decision in this case is in conflict with *American Trucking Associations, Inc. v. Scheiner*, 483 U.S. __, 97 L.Ed.2d 226, 107 S.Ct. 2829 (1987); *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 621-622, 69 L.Ed.2d 884, 897, 101 S.Ct. 2946 (1981) and cases cited therein. As this Court explained in the *Commonwealth Edison* case, "user fees" or "user taxes" that are designed as specific charges imposed for the use of state owned or state provided transportation facilities cannot be tested by standards which generally determine the validity of "general revenue taxes." Such user fees imposed on interstate commerce can only be upheld if they do not appear to be manifestly disproporationate to the benefits conferred. In other words, they can only be upheld if they are reasonably calculated to reimburse the state for the cost of any services furnished and/or compensate the state for the reasonable value of the use of the state owned or state provided transportation facility. In so stating, this Court cited *Evansville-Vanderburgh Airport Authority District v. Delta Airlines, Inc.*, 405 U.S. 707, 31 L.Ed.2d 620, 92 S.Ct. 1349 (1972); *Clark v. Paul Gray, Inc.*, 306 U.S. 583, 83 L.Ed. 1001, 59 S.Ct. 744 (1939); and *Ingels v. Morf*, 300 U.S. 290, 81 L.Ed. 653, 57 S.Ct. 439 (1937). More recently,

in the *American Trucking Associations* case, this Court reviewed the *Commonwealth Edison* case, *supra,* and the *Evansville-Vanderburgh Airport Authority* case, *supra,* and once again emphasized that such user fees or user taxes must be based on a fair approximation of the cost or value of the use of the facilities in question. 97 L.Ed.2d at 247, 107 S.Ct. at 2843-2844.

Here, in contrast to the above authorities, the Ninth Circuit has approved a street user fee which is not measured by either the value of the city streets or the value of any services furnished by the City. Instead, it is measured entirely by something irrelevant — the value of privately owned lands abutting the streets. The Ninth Circuit did so in the absence of any evidence whatsoever in the record that the value of the city streets and the value of the privately owned lands abutting the city streets are in any way comparable. Indeed, common sense indicates that they are not comparable. The record below demonstrates that the lands abutting the streets are either already built upon or are buildable, whereas the lands in the streets are restricted and cannot be built upon at all.

The Ninth Circuit's decision also conflicts with a decision of the Eleventh Circuit. In *Arrow Airways, Inc. v. Dade County,* 749 F.2d 1489, 1491-1493 (11th Cir. 1985), that court considered a Commerce Clause challenge to rents and fees charged to tenants at Miami International Airport. The Eleventh Circuit applied the *Evansville-Vanderburgh Airport Authority* case, *supra,* and found that the rents and fees were reasonable because, *inter alia,* the rents charged at the airport were 75 to 80 percent of the market level of rents charged for *similar property* in the areas surrounding the airport. Here, in contrast to *Arrow Airways, Inc.,* the Ninth Circuit has approved a street user fee which is not shown to be at all comparable to rentals or fees charged for other similar properties. Indeed, the only evidence on fees

charged for other oil pipelines in city streets elsewhere would indicate a $10,000 per year franchise; *i.e.*, $2,564 per mile per year, rather than the $59,000 per mile per year demanded by the City. Similarly, comparison to the natural gas pipeline franchise in Santa Monica would suggest a yearly fee of approximately $1,000 per mile.

Even if one were to assume for sake of argument that the franchise fee should be evaluated as though it were a general revenue tax rather than a "user fee" or "user tax," the Ninth Circuit decision in the instant case would also be directly in conflict with the *Commonwealth Edison Co.* case, *supra*. In *Commonwealth Edison*, this Court, reviewing a general revenue tax, applied the four-part test of *Complete Auto Transit v. Brady*, 430 U.S. 274, 51 L.Ed.2d 326, 97 S.Ct. 1076 (1977). At page 617 of 453 U.S., this Court explained that under *Complete Auto Transit's* four-part test, a state tax does not offend the Commerce Clause if it (1) is applied to an activity with a substantial nexus with the taxing jurisdiction, (2) is fairly apportioned, (3) does not discriminate against interstate commerce and (4) is fairly related to services provided by the taxing jurisdiction. At page 626 of 453 U.S., the *Commonwealth Edison* case teaches that the fourth prong of the *Complete Auto Transit* test, at least in the context of general revenue taxes, merely means that the measure of the tax must be reasonably related to the extent of the taxpayer's contact with the taxing jurisdiction. *Commonwealth Edison* explains that this is because it is the presence of the taxpayer in the jurisdiction that justifies the taxpayer's being required to bear a just share of the tax burden.

Here, the Ninth Circuit decision is in conflict for two reasons. First, as we discuss hereafter (See heading II), the franchise fee demanded by the City of Santa Monica does discriminate against interstate commerce. Second, the Ninth Circuit decision conflicts with the fourth prong of

the *Complete Auto Transit* test in that the measure of the franchise fee is not in any way reasonably related to the extent of the pipeline's contact with the City. The franchise fee is imposed as if the pipeline passed through the lands abutting the city streets. It does not. It passes through the city streets themselves. For the measure of the franchise fee to be reasonably related to the pipeline's contact with the City, it must be measured by the City's costs and/or the value of the city streets.

Pipelines simply cannot pass through heavily urbanized areas without utilizing public streets. Recognizing that the free flow of commerce was vital to the economic survival of the United States, the framers of the Constitution created the Commerce Clause. This Court, recognizing that the free flow of commerce would be impaired if state and local governments were allowed to overreach in the desire to maximize revenues from interstate commerce, has imposed limits on user fees. The Court has limited such fees to the value of the benefits conferred — in other words, it has limited them to the value of any services furnished plus the value of the property utilized. In addition, this Court has also limited general revenue taxes to those which, among other things, are reasonably related to the contact that the instrument of commerce has with the taxing jurisdiction. The Ninth Circuit's decision in the instant case casts aside those protections and allows overreaching. It allows a strategically located city to extract a tribute from a pipeline carrying oil in interstate commerce, which tribute is far in excess of the value of any benefits conferred and which is totally unrelated to the pipeline's contact with the City. Therefore, whether the franchise fee is analyzed as a "user fee" or as a "general revenue tax," the Ninth Circuit decision is in conflict with decisions of this Court and another federal Court of Appeals.

II.

The Ninth Circuit's Conclusion That The Commerce Clause Does Not Prohibit Discrimination Against A Pipeline Carrying Oil In Interstate Commerce Unless The Discrimination Is In Favor Of A Local Pipeline Carrying Oil (And Not In Favor Of A Local Pipeline Carrying Natural Gas) Raises Important And Unresolved Questions Of Federal Constitutional Law.

The Ninth Circuit concluded in this case that because there were no local *oil* pipelines and, indeed, the Shell Oil Company pipeline was the *only oil* pipeline in the entire City, there was no basis for Shell's contention that the franchise fee demanded by the City discriminated against interstate commerce and in favor of local commerce. The Ninth Circuit decision dismisses as legally irrelevant the fact that the franchise fee demanded by the City is some 59 times greater than the franchise fee charged the local gas company for the same pipeline use of the streets to deliver natural gas to local inhabitants, or the franchise fee charged the local electrical utility for the same use of the city streets to deliver electricity to local inhabitants. Apparently, the Ninth Circuit would only allow a trial on the fact of discrimination to go forward if the Shell Oil Company pipeline were being charged 59 times more per mile than some local *oil* pipeline.

Although there are numerous cases decided by this Court holding that discrimination against interstate commerce will not be tolerated, *e.g., American Trucking Associations, Inc., supra,* 97 L.Ed.2d at 246-248, 107 S.Ct. at 2843-2844; *Maryland v. Louisiana,* 451 U.S. 725, 753-760, 68 L.Ed.2d 576, 101 S.Ct. 2114 (1981), we have been able to find no case discussing the type of conduct sanctioned by the Ninth

Circuit in this case. We submit that the Ninth Circuit's decision on this point sanctions a particularly invidious form of discrimination. It allows a city to charge interstate commerce in one commodity a very high franchise fee so that local commerce in a different commodity can be subsidized, even though both the interstate commerce and the local commerce make the same use of the streets.

Local commerce is protected from excessive fees by the political process. Obviously, if excessive fees were extracted from local utilities, those fees would eventually show up in the billing sent by the local utilities to the local citizenry and there would be a political outcry. On the other hand, the City can safely charge interstate commerce a very high fee without fear of political repercussions from the local citizenry. The political process thus offers no protection from this type of discrimination. Only the Constitution, as interpreted and enforced by the courts, can prevent it.

From the standpoint of guaranteeing the free flow of commerce, it should make no difference that the interstate commerce, which is being asked to subsidize local commerce, involves a different commodity. The use of the streets by the local commerce is the same as the use of the streets by the interstate commerce. Therefore, there is still discrimination. This is exactly the sort of thing the Commerce Clause was designed to prevent. The Ninth Circuit's decision thus raises an important and unresolved question of federal constitutional law which should be decided by this Court.

III.

The Ninth Circuit's Approval Of A Summary Judgment Upholding User Fees For City Streets Based Entirely On The Value Of Privately Owned Lands Abutting The Streets In The Absence Of Evidence That Buildable Lands Abutting The Streets Are Comparable In Value To Nonbuildable Lands In The Streets, So Far Departs From The Accepted And Usual Course Of Judicial Proceedings As To Call For An Exercise Of This Court's Power Of Supervision.

Supreme Court Rule 17.1 permits review on certiorari where a federal court of appeals has so far departed from the accepted and usual course of judicial proceedings that the Supreme Court deems it necessary to exercise its power of supervision over the lower federal courts. This case presents a situation where the Court should exercise that supervisory power.

The Ninth Circuit, in upholding the district court's grant of summary judgment on the franchise fee issue, violated one of the most basic of rules. Under Rule 56 of the Federal Rules of Civil Procedure, summary judgment may not be granted where there is a genuine issue of material fact remaining to be tried. Here, the court of appeals affirmed the district court's decision in spite of the presence of a genuine issue of material fact disclosed by the record below. Not only was the existence of this issue of material fact disclosed by the record, but the existence was conceded by *both* parties in the trial court.

As set forth above in Petitioner's Statement of the Case, Shell's Statement of Genuine Issues of Facts filed in the district court on February 8, 1986 (reprinted as Appendix E) stated that a genuine issue of fact remained for trial:

> "What is the maximum amount of a fee which would (a) reimburse the City of Santa Monica for the cost of any services furnished by it in connection with the operation of the pipeline, and (b) compensate the City for the reasonable value of any rights the City would surrender to Shell under the renewal franchise?"

In its Statement of Genuine Issues of Material Fact dated March 24, 1986 (reprinted as Appendix F), the City of Santa Monica contended that under its theory of the case, there were *no* genuine issues of material fact to be tried, but then proceeded to submit a number of alleged genuine issues of material fact remaining to be tried in the event the City's theory of the case *did not* prevail. Among those genuine issues of fact is the following:

> "What amount reflects the fair market value of the subject right-of-way."

As to the franchise fee issue, the district court *did adopt* the City of Santa Monica's theory of the case and, therefore, *never reached this genuine issue of material fact.* The Ninth Circuit, however, rejected the City's theory of the case. This revived the genuine issue of material fact relative to valuation and, therefore, the Ninth Circuit should have remanded the case for further proceedings on this issue.

There is clearly a conflict in the evidence on this issue of material fact. As already demonstrated, a declaration filed in the district court by the City of Santa Monica, as well as the City's own Proposed Statement of Uncontraverted Facts demonstrate that the opinions of the City's appraiser and Shell's appraiser as to the reasonable value of the franchise differ dramatically. Further, the City's appraiser valued the franchise in relation to the value of lands abutting the streets, but the City failed to provide any

evidence showing the value of the lands abutting the city streets was comparable or in any way similar to the value of lands in the city streets. In fact, the record is devoid of any evidence demonstrating such comparability or similarity. On these facts, the appellate court's affirmance of the summary judgment originally entered in the trial court on other grounds was inappropriate as a matter of law. *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 157-161, 26 L.Ed.2d 142, 90 S.Ct. 1598 (1970); *United States v. Diebold*, 369 U.S. 654, 655, 8 L.Ed.2d 176, 82 S.Ct. 993 (1962).

The existence of this factual conflict in the evidence was brought to the attention of the court of appeals in Shell's petition for rehearing. Nevertheless, the Ninth Circuit denied Shell's petition for rehearing.

Summary judgment should never be granted in cases where there is a genuine dispute over issues of material fact. This is particularly true in cases involving important questions of constitutional law. 6 J. Moore & J. Wicker, *Moore's Federal Practice*, § 56.17[10] (1987); 10 A. C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure*, § 2732.2 (1983). For that reason, Shell respectfully submits that this is an appropriate case for this Court to exercise its supervisory powers and order that the case be remanded to the district court for further proceedings relating to the reasonable value of the benefits conferred by the franchise.

CONCLUSION

For all of the above-stated reasons, petitioner respectfully requests that the Court grant the Petition as prayed.

Dated: April 9, 1988

Respectfully submitted,

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APPENDIX A

SHELL OIL COMPANY, a Delaware Corp.
Plaintiff-Appellant-Cross-Appellee,
vs.

CITY OF SANTA MONICA, a municipal corp.,
Defendant-Appellee-Cross-Appellant.

Nos. 86-6103, 86-6206

United States Court of Appeals,
Ninth Circuit

Argued and Submitted May 5, 1987.
Decided October 21, 1987.

830 F.2d 1052

Edward S. Renwick, Los Angeles, Cal., for plaintiff-appellant-cross-appellee.

Mary H. Strobel, Santa Monica, Cal., for defendant-appellee-cross-appellant.

Appeal from the United States District Court for the Central District of California.

Before PREGERSON, NELSON and WIGGINS, Circuit Judges.

NELSON, Circuit Judge:

Shell Oil Company appeals from a grant of summary judgment holding (1) that the City of Santa Monica is exempt from the dormant commerce clause under the market participant doctrine in its setting of a franchise fee for an oil pipeline traversing the city and (2) that the state constitution does not bar the fee. Santa Monica cross-appeals from a grant of summary judgment holding that the Hazardous Liquid Pipeline Safety Act, 49 U.S.C.A. §§

2001-2014 (Supp. 1987), preempts Santa Monica from imposing any safety standards in an intrastate pipeline franchise agreement. We have jurisdiction pursuant to 28 U.S.C. § 1291 (1982). We affirm in part and vacate and remand in part.

BACKGROUND

In 1941, the City of Santa Monica and a predecessor of Shell Oil Company entered into a forty-year franchise agreement to operate an oil pipeline underneath city streets. Santa Monica does not hold a fee interest in the streets; it holds an easement in the streets for street purposes. The 1941 franchise granted Shell's predecessor an exclusive subsurface easement in, under, along, and across certain public streets. It provided that the grantee would comply with all ordinances, rules, or regulations then or thereafter adopted by the Santa Monica City Council. The franchise did not include any provision for renewal. Today, Shell owns, operates, and maintains the pipeline.

The entire pipeline traverses 82.2 miles from Ventura County, California, to Shell's Wilmington refinery in Los Angeles County, California. The portion within Santa Monica totals 3.9 miles. The ten-inch diameter pipe enters the northeast corner of the city and runs roughly north to south, parallel to the coast, a few blocks inside Santa Monica's eastern boundary with the City of Los Angeles. For the most part, the pipe lies approximately forty-eight inches below the surface of the street. It runs within some fifty feet of the city's water well #6, passes by the San Vicente reservoir, intersects several storm drains flowing west to the sea, and crosses over the Santa Monica Freeway (Interstate 10). The area the pipe traverses is heavily residential and commercial. Under the franchise agreement, Shell paid Santa Monica a total annual fee of $1,029.60,

based on a formula of $.005 per inch internal diameter per linear foot of pipe.

As of 1985 and early 1986, the Ventura pipeline carried in excess of 32,000 barrels of crude oil per day. All of Shell's drilling sites are onshore in California. Pursuant to "exchange agreements," however, Shell also acquires title to oil drilled by other oil companies on the outer continental shelf and transmits the combined oil through the pipeline. Shell thus holds title to all of the oil while in the pipeline. Approximately 89% of the pipeline's oil is then delivered to Shell's Wilmington refinery, accounting for 24% of the refinery's input. Some of the fuel produced at the refinery is delivered to suppliers in Nevada and Arizona. The remaining 11% of the crude oil carried in the pipeline is distributed to the other oil companies from whom Shell acquired title under the exchange agreements.[1]

Prior to the expiration of the agreement in 1981, Santa Monica and Shell commenced negotiations for a new franchise agreement. In May 1981, Shell proposed an annual fee of $8,514.51, which Santa Monica rejected. After commissioning a firm to appraise the fair rental value of the route, Santa Monica proposed a flat fee of $237,000 per year (with inflation escalators). This amount was based on a five-foot wide subsurface right of way valued at a rate corresponding to 50% of the abutting surface land value, assessed at an annual 12.5% rate of return. Shell countered with a figure of $10,000 to $12,500 per year, based on its own firm's appraisal of pipeline franchise fees, with numerous other California cities.[2]

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[1] Shell does not claim that it is a common carrier or public utility that would be both subject to PUC regulation and vested with the power of eminent domain. *See* Cal.Pub.Util.Code §§ 610, 615 & comments, 211, 216, 228 (West 1975 & Supp.1987).

[2] Santa Monica alleged that nearly all of these cities were general law

The parties also disagreed over the inclusion of safety standards in the proposed franchise agreement. The engineering firm retained by Santa Monica noted three prior ruptures in the Ventura pipeline, resulting in spills of 4,337 barrels of crude oil, and analyzed the risks and consequences of future ruptures. *See* NDE Technology, Inc., *Safety Study for the Section of the Shell Oil Ventura 10-inch Crude Pipeline* (November 1981). In view of the age of the pipeline, its special physical characteristics,[3] and the high density residential and commercial areas it traverses, the NDE report recommended numerous safety improvements, which Santa Monica proposed to include in the franchise agreement. The firm retained by Shell to conduct a safety analysis, while acknowledging the possibility of accidents, emphasized the safety record of the Ventura pipeline, disputed some aspects of the NDE report, and generally presented a more optimistic view of the potential risks. *See* Bechtel Petroleum, Inc., *Santa Monica Segment Shell Ventura Crude Oil Pipeline* (February 1982). Shell objected to the inclusion of any safety standards in the franchise.

To date, the parties have not signed a new franchise agreement. Interim agreements have allowed Shell to continue to use the substreet easement, apparently at a fee of approximately $10,000 or $11,000 per year.

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cities subject to a franchise fee formula under the California Public Utilities Code § 6231 (West Supp. 1987). Santa Monica is a charter city, *see Pines v. City of Santa Monica*, 29 Cal.3d 656, 630 P. 2d 521, 175 Cal.Rptr. 336 (1981), which it asserts is not required to apply the PUC formula.

[3] The study emphasized the 1600-foot vertical drop in the pipeline just north of the city boundary, which would increase both the pipeline pressure within Santa Monica and the volume of oil spilled in the event of a rupture.

On May 14, 1982, two days prior to the expiration of one of the interim agreements, Shell filed a complaint in federal district court. Shell sought declarations that (1) the proposed fee would unreasonably burden interstate commerce in violation of the commerce clause; (2) Santa Monica may impose only a fee that does not exceed the costs of any city services provided in connection with the pipeline and the reasonable value of the property rights surrendered to Shell in the franchise; (3) the fee violates the California Constitution; (4) Santa Monica violated the federal and state equal protection clauses by discriminating between Shell and other grantees of substreet easements; and (5) federal and state law preempt Santa Monica's attempt to impose any safety standards on the pipeline. Shell also sought permanent injunctive relief, *inter alia,* that Santa Monica (1) may not prevent Shell from transporting crude oil in the pipeline or otherwise interfere "with Shell's right to transport crude oil by pipeline through the City"; (2) may impose a fee based only on the reimbursement/compensation costs described above; and (3) may not impose any pipeline safety standards.

On June 12, 1986, the district court granted summary judgment in favor of Santa Monica in part and in favor of Shell in part. On the commerce clause issues, the court principally held that Santa Monica is a market participant in the area of oil transportation and thus is not subject to commerce clause restrictions. Second, the court held that the California Constitution did not bar the proposed fee. Finally, the court held that federal law preempts Santa Monica's attempt to impose any safety standards. Both parties filed timely appeals.

STANDARD OF REVIEW

This court reviews de novo a grant of summary judgment and any determinations of federal and state law. *T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n*, 809 F.2d 626, 629-30 (9th Cir. 1987). We must determine whether, viewing the evidence in the light most favorable to the nonmoving party, there remains no genuine issue of material fact for trial and the moving party is entitled to judgment as a matter of law. *Id.* at 630.

DISCUSSION

I. *The Federal Commerce Clause Issues*

A. *The Market Participant Doctrine*

Shell's primary challenge is that the $237,000 annual fee violates the federal commerce clause because it places an unreasonable burden on interstate commerce. By its own terms, the commerce clause grants Congress power "[t]o regulate Commerce . . . among the several States." U.S. Const. art. I, §8, cl. 3. The present case does not involve an affirmative exercise of that power by Congress insofar as the route of the pipeline or the amount of the fee is concerned.[4] However, even in the absence of affirmative congressional action, the commerce clause prohibits states from taking certain action respecting interstate commerce.

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[4] *See* 49 U.S.C.App. §2001(4) (1982) (expressly providing that the Secretary of Transportation does not have authority to prescribe the location or routing of any oil pipeline facility); 49 U.S.C.A. § 1682a (Supp. 1987) (authorizing the Secretary of Transportation to establish pipeline safety user fee schedule for regulatory and enforcement activity under the Hazardous Liquid Pipeline Safety Act, but saying nothing on easement fees).

CTS Corp. v. Dynamics Corp. of Am., ___ U.S. ___ , 107 S.Ct. 1637, 1648, 95 L.Ed.2d 67 (1987). The Court's interpretation of " 'these great silences of the Constitution,' " *id.* (quoting *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 535, 69 S.Ct. 657, 663, 93 L.Ed. 865 (1949)), has sprung primarily from a concern to avoid the Balkanization of commerce among the states. *See Hughes v. Oklahoma*, 441 U.S. 322, 325-26, 99 S.Ct. 1727, 1731, 60 L.Ed.2d 250 (1979); *see also* Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 Mich. L. Rev. 1091, 1094-95 (1986) (arguing that the dormant commerce clause is concerned primarily with purposeful economic protectionism). Yet, as the Court itself recently stated, its dormant commerce clause jurisprudence "has not always been easy to follow." *CTS Corp.*, 107 S.Ct. at 1648.

In the present case, the district court granted Santa Monica's motion for summary judgment on the franchise fee question on the ground that Santa Monica acted as a "market participant" that is not subject to the restrictions of the dormant commerce clause. Under the Court's market participant doctrine, if a state or state subdivision acts as a market participant rather than as a market regulator, the commerce clause does not "'require independent justification'" for any protectionist practices. *White v. Massachusetts Counsel of Constr. Employers, Inc.*, 460 U.S. 204, 207, 103 S.Ct. 1042, 1044, 75 L.Ed.2d 1 (1983) (quoting *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 809, 96 S.Ct. 2488, 2497, 49 L.Ed.2d 220 (1976)). However, the key distinction between "market regulator" and "market participant," *see, e.g., South-Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 93, 104 S.Ct. 2237, 2243, 81 L.Ed 2d 71(1984) (plurality), though clearly defined in theory, has occasioned considerable dispute in application in the four principal Supreme Court cases. *See Hughes v.*

Alexandria Scrap Corp., 425 U.S. 794, 96 S.Ct. 2488, 2497, 49 L.Ed.2d 220 (1976) (6-3 decision by Powell; White in dissent); *Reeves, Inc. v. Stake*, 447 U.S. 429, 100 S.Ct. 2271, 65 L.Ed.2d 244 (1980) (5-4 decision by Blackmun; Powell and White in dissent); *White*, 460 U.S. 204, 103 S.Ct. 1042 (7-2 decision by Rehnquist; Blackmun and White in dissent); *Wunnicke*, 467 U.S. 82, 104 S.Ct. 2237 (4-2-2 decision by White, joined by Blackmun; Powell concurrence in result; Rehnquist dissent). For reasons discussed below, we hold that Santa Monica has not acted as a market participant for purposes of the dormant commerce clause.

This case falls somewhere between the paradigm examples of market regular and market participant. *Cf. Reeves*, 447 U.S. at 439 n. 12, 100 S.Ct. 2278, n. 12 ("When a State buys or sells, it has the attributes of both a political entity and a private business."). Santa Monica has not acted as a paradigm market regulator, as it would if it adopted an ordinance regulating the fees for all oil pipelines within the city. Santa Monica has independently negotiated a franchise agreement with Shell and has not prohibited private landowners in the city from selling easements to Shell. Hence, Santa Monica urges the position that it should be deemed a market participant because the franchise relationship with Shell is contractual. But contractual privity does not insulate a state or local body from commerce clause scrutiny. *Wunnicke*, 467 U.S. at 97, 104 S.Ct. at 2245 (holding that a state may not impose requirements with "a substantial regulatory effect outside of that particular market" merely because it can use its economic power to impose a requirement upon someone with whom it is in contractual privity); *see Golden State Transit Corp. v. City of Los Angeles*, 475 U.S. 608, 106 S.Ct. 1395, 1400-01, 89 L.Ed. 2d 616 (1986); *Wisconsin Dep't of Indus., Labor & Human Relations v. Gould, Inc.*, 475 U.S. 282, 106 S.Ct. 1057, 1062-64, 89 L.Ed.2d 223 (1986).

Santa Monica argues that it has entered the particular market for the transportation of crude oil. The City controls easements in the area beneath city streets, a commodity with value that it may sell to Shell. The city thus competes with other entities that also might supply Shell's needs — private landowners in Santa Monica who may sell easements under their land, neighboring municipalities and private landowners, and tank truck and barge operators.

Although Santa Monica's argument is not without considerable intuitive appeal, this court has previously rejected a similar argument in a related context. In *Western Oil & Gas Ass'n v. Cory*, 726 F.2d 1340 (9th Cir. 1984), *aff'd per curiam by an equally divided Court*, 471 U.S. 81, 105 S.Ct. 1859, 85 L.Ed.2d 61 (1985), this court held that the State of California did not act as a market participant in its attempt to impose a fee for the transportation of crude oil from offshore oil rigs across state-owned tidal and submerged lands. The court reasoned that California did not participate in a "market" in the sense intended under the Supreme Court's dormant commerce clause jurisprudence because the state held the land by virtue of its sovereign capacity and the state commission had a virtual monopoly over the sale of easements on tidal and submerged lands. *Id.* at 1343. The court reached this conclusion even though alternatives arguably existed to the pipeline route over state lands, albeit with varying degrees of economic feasibility. In particular, the pipeline operators apparently could have sought a pipeline route over certain tidal lands that the state did not own, *see id.*, or transported the oil by barge. The court also observed: "This control over the channels of interstate commerce permits the State to erect substantial impediments to the free flow of commerce." *Id.*

As the district court recognized, the present case is distinguishable from *Cory* insofar as California had a

stronger monopoly position than Santa Monica has. Shell concedes the existence of alternatives to a pipeline under Santa Monica streets. However, like *Cory*, this case involves lands held in a sovereign capacity that are recognized transportation corridors for commerce. As the court recognized in *Cory*, restrictions on publicly controlled transportation corridors raise the dormant commerce clause concern for impediments to the free flow of commerce. *See* Regan, *supra*, at 1184 (discussing "the special importance of an effective transportation network" to interstate commerce). We would find it untenable if a state or its subdivision could allocate rights to the use of publicly held transportation corridors in a manner that discriminated against interstate commerce in favor of intrastate commerce. *See West v. Kansas Natural Gas Co.*, 221 U.S. 229, 262, 31 S.Ct. 564, 574, 55 L.Ed. 716 (1911) (invalidating a state attempt to refuse to grant underground pipeline easements across state highways to foreign corporations, while granting similar easements to domestic corporations for intrastate transportation of the same commodity, when the apparent purpose was to limit export of natural gas produced in state).

We therefore conclude that, following *Cory*, Santa Monica is not a market participant in the setting of franchise fees for easements under public streets.[5] Santa

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[5] We are mindful of the fact that franchising is, as a general matter, a traditional governmental function and that members of the Court have indicated that the market participant doctrine rests in part on considerations of state sovereignty. *See Reeves*, 447 U.S. at 438-39, 100 S.Ct. at 2278 (Blackmun, J.); *accord White*, 460 U.S. at 207 n. 3, 103 S.Ct. at 1044 n. 3 (Rehnquist, J.). "It follows easily that the intrinsic limits of the Commerce Clause do not prohibit state marketplace conduct that falls within this sphere" of " 'integral operations in areas of traditional governmental functions.' " *Reeves*, 447 U.S. at 438 n. 10, 100 S.Ct. at 2278 n. 10. We believe, however, that Santa Monica has not

Monica contends that such a holding in effect would vest a private company with the power of eminent domain, or, alternatively, vest a private company with the power to dictate the terms on which it uses substreet property. We reject these contentions. Our holding that Santa Monica is not a market participant means only that in deciding whether, or on what terms, to grant a franchise for the use of public streets the city may not burden interstate commerce in a manner that violates the dormant commerce clause.[6]

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engaged in "marketplace conduct" within the meaning of the market participant exception and that the city's action with respect to transportation corridors is "the kind of action with which the Commerce Clause is concerned." *Alexandria Scrap,* 426 U.S. at 805, 90 S.Ct at 2495; *see also* Regan, *supra,* at 1198-99 n. 210 (arguing that *Wisconsin Dep't of Indus., Labor & Human Relations v. Gould Inc.,* 475 U.S. 282, 106 S.Ct. 1057, 89 L.Ed.2d 223 (1986), "reveals that the estate-as-market-participant doctrine is *not* aptly regarded as a doctrine about 'state sovereignty' "); *cf. Garcia v. San Antonio Metro. Transit Auth.,* 469 U.S. 528, 105 S.Ct. 1005, 83 L.Ed.2d 1016 (1985) (Blackmun, J.) (overturning *National League of Cities v. Usery,* 426 U.S. 833, 96 S.Ct. 2465, 49 L.Ed.2d 245 (1976), and restricting scope of state sovereignty in the face of affirmative congressional action under the commerce clause).

We observe that this case involves only substreet easements controlled by the city in its sovereign capacity. *See Cory,* 726 F.2d 1343. We have no occasion to decide what restrictions, if any, the dormant commerce clause may place on the sale of property interests in land purchased or acquired by the city through its entry into the real estate market.

[6] Hence, we have no difficulty acknowledging the legitimacy of state laws that generally authorize a municipality to grant a franchise under public streets on such "terms and conditions . . . whether governmental or contractual in character, as in the judgment of the legislative body are to the public interest," *see* Cal.Pub.Util.Code § 6203 (West 1965), or that authorize a city to require that a nonpublic pipeline utility, " if granted the franchise, will pay to the municipality . . . an annual franchise fee in an amount agreed to by the applicant and the municipality," *see id.* § 6231 (West Supp. 1987). *See Sunset Tel. & Tel. Co. v. City of Pasadena,*

B. The Dormant Commerce Clause

Our conclusion that Santa Monica has not acted as a market participant does not end our inquiry. We must also determine whether the proposed franchise fee is invalid under a traditional dormant commerce clause analysis. At the outset, we note that this case does not involve either of the two primary objects with which the commerce clause is concerned — statutes that discriminate against interstate commerce and statutes that adversely affect interstate commerce by subjecting activities to inconsistent regulations. *CTS Corp.*, 107 S.Ct. at 1648-49; *id.* at 1652 (Scalia, J., concurring). First, Santa Monica has not acted to restrict the flow of goods or natural resources from being shipped into or outside of its boundaries in order to protect producers or suppliers within the city. *See, e.g., Hughes v. Oklahoma*, 441 U.S. 322, 99 S.Ct. 1727, 60 L.Ed.2d 250 (1979); *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142, 90 S.Ct. 844, 847, 25 L.Ed.2d 174 (1970); *West*, 221 U.S. 229, 31 S.Ct. 564. Santa Monica has not acted to favor domestically produced crude oil over that produced outside of Santa Monica; none is produced in Santa Monica. In addition, Shell has not presented any evidence that Santa Monica has treated any local oil pipeline operators preferentially. The record shows that Shell is the only company operating an oil pipeline in Santa Monica.[7] The

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161 Cal. 265, 284, 118 P. 796, 804 (1911).

[7] Shell has presented evidence that Santa Monica has franchise agreements with two public utilities at lower fees than the fee proposed in its renewal agreement. Southern California Edison Company pays an annual fee of approximately $1,516 per mile for its substreet electric powerlines. Southern California Gas Company pays an annual fee of approximately $1,004 per mile for its substreet natural gas mains. Santa Monica's proposed fee for Shell is approximately $59,000 per mile.

fact that the practical burden of Santa Monica's actions with respect to oil pipeline operators may fall on nonlocal companies because of the absence of local oil pipeline operators does not establish discrimination against interstate commerce. *CTS Corp.*, 107 S.Ct. at 1649.

Second, Santa Monica's franchise fee poses no threat of inconsistent regulation. The amount of a franchise fee is unlike regulations on the method or mode of transportation that the Court has struck down. *See Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662, 671, 101 S.Ct. 1309, 1316, 67 L.Ed.2d 580 (1981) (plurality) (invalidating regulation of truck size on interstate highways); *Southern Pac. Co. v. Arizona,* 325 U.S. 761, 773-74, 65 S.Ct. 1515, 1522, 89 L.Ed. 1915 (1945) (noting the "confusion and difficulty" that would attend the "unsatisfied need for uniformity" in setting maximum limits on train lengths). Interstate transportation of oil is not impeded by the fact that states, counties, cities, and private landowners may assess *different* charges for the use of land under or through which a pipeline passes.

Shell's equal protection argument is without merit. Santa Monica has legitimately distinguished between public utilities, which provide a public benefit to all of its citizens, and Shell's private pipeline operation, which does not. Moreover, the record does not reveal when, or under what circumstances, the franchise fees for the public utilities were set; property values may have increased dramatically since that time. Finally, oil pipelines may present different hazards than gas and electric lines and, accordingly, expose the city to greater liability. We therefore reject Shell's equal protection argument.

We also note that Shell is unable to maintain a challenge under the privileges and immunities clause of the federal Constitution, because corporations are not "citizens" for purposes of that clause. *See Hemphill v. Orloff*, 277 U.S. 537, 548-50, 48 S.Ct. 577, 579, 72 L.Ed. 978 (1928).

Shell's primary challenge is that Santa Monica's proposed franchise fee, viewed as a "user fee" or "rent," is disproportionate to the value of the city land and services rendered.[8] The Supreme Court has traditionally upheld user fees only if they bear a reasonable relationship to the government's costs. *See Evansville-Vanderburgh Airport Auth. Dist. v. Delta Airlines, Inc.*, 405 U.S. 707, 92 S.Ct. 1349, 31 L.Ed.2d 620 (1972) (upholding airport user fee collected to defray costs of airport construction and maintenance, where fee was apportioned to reflect amount of use and was not excessive in relation to the actual costs incurred); *Clark v. Paul Gray, Inc.*, 306 U.S. 583, 598-600, 59 S.Ct. 744, 752-53, 83 L.Ed. 1001 (1939) (upholding fee on caravan traffic that was not shown to be manifestly disproportionate to the cost of using the highways); *Ingels v. Morf*, 300 U.S. 290, 57 S.Ct. 439, 81 L.Ed. 653 (1937) (striking down a fee on caravan traffic found excessive in comparison to costs of using highway); *Interstate Transit, Inc. v. Lindsey*, 283 U.S. 183, 51 S.Ct. 380, 75 L.Ed. 953 (1931) (invalidating user fee that was proportioned solely to earning capacity of vehicles, not number of passengers, mileage, or wear and tear on road incident to vehicles' use).

Similarly, in *Cory*, we made clear that user fees must be proportional to the value of the services rendered. There, we considered whether California's attempt to impose a fee

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[8] We agree with Shell's characterization of the franchise fee as a user fee or rent, as opposed to a tax. Whereas the level of taxation of a given activity lies almost exclusively within the determination of the taxing jurisdiction, *see Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 101 S. Ct. 2946, 69 L.Ed.2d 884 (1981) (severance tax on coal mined in state upheld), Santa Monica has not acted in such a manner. By its own admission, it seeks to secure compensation for the [sic] Shell's use of substreet easement; it has not imposed a city-wide tax on oil pipeline operators regardless of whether the pipelines traverse publicly or privately owned land.

for an easement across state-owned submerged tidelands violated the dormant commerce clause. The "rent" for this easement was a flat 8% of the land's appraised value, plus an amount proportional to the volume of oil transported in the pipeline. We found no defect in the flat fee, but held that the volumetric charge unduly burdened interstate commerce, because as a "user fee" it was not apportioned to reflect the benefits conferred by the state. *Cory*, 726 F.2d at 1343-45.

The district court upheld the $59,000 per mile fee, finding that it resembled the portion of the user fee upheld in *Cory*. We agree with the district court that *Cory's* user fee analysis does not require invalidation of the proposed franchise fee because the fee was valued according to a reasonable percentage of the appraised value of land abutting the pipeline within the city. Because Santa Monica's fee is based on an evenhanded formula and not graduated by the amount of business done, it is not a "customs duty" on goods passing through its jurisdiction like the volumetric charge held invalid in *Cory*. Shell does not dispute Santa Monica's contention that the proposed franchise fee was based on an appraisal of 50% of the property value of the abutting land, capitalized at an annual rate of 12.5%.

As in *Cory*, we are unable to conclude that this valuation is "'manifestly disproportionate to the services rendered.'" *Commonwealth Edison v. Montana*, 453 U.S. 609, 621-22 & n.12, 101 S.Ct. 2946, 2955-56 & n.12, 69 L.Ed.2d 884 (1981) (quoting *Clark*, 306 U.S. at 599, 59 S.Ct. at 753). We conclude that Shell has not met its burden at summary judgment of showing that Santa Monica has discriminated against interstate commerce. Accordingly, we affirm the district court's grant of summary judgment.

II. *The State Constitutional Issue*

Shell also argues that the California Constitution precludes imposition of the proposed fee. *See* Cal. Const. art. XI, §7 ("A county or city may make and enforce *within its limits* all local, police, sanitary, and other ordinances and regulations not in conflict with general laws.") (emphasis added); *id.* art. I, § 7 (equal protection provision). In *City of Los Angeles v. Shell Oil Co.*, 4 Cal.3d 108, 480 P.2d 953, 93 Cal.Rptr. 1 (1971), the California Supreme Court identified principles that restrict the ability of local governments to tax intercity activity:

> [I]n spite of the absence of a specific "commerce clause" in our state Constitution, other provisions in that Constitution — notably those provisions forbidding extraterritorial application of laws and guaranteeing equal protection of the laws . . . —combine with the equal protection clause of the federal Constitution to proscribe local taxes which operate to unfairly discriminate against intercity businesses by subjecting such businesses to a measure of taxation which is not fairly apportioned to the quantum of business actually done in the taxing jurisdiction. On the other hand, those constitutional principles do not *prohibit* local license taxes upon businesses "doing business" both within and outside the taxing jurisdiction; as long as such taxes are apportioned in a manner by which the measure of tax fairly reflects that proportion of the taxed activity which is actually carried on within the taxing jurisdiction, no constitutional objection appears. However, and conversely, no measure of apportionment can satisfy the constitutional standard if the measure of tax is made to depend upon a factor which

> bears no fair relationship to the proportion of the taxed activity actually taking place within the taxing jurisdiction.

Id. at 124, 480 P.2d at 963, 93 Cal.Rptr. at 11. This case implicates neither the concern for extraterritorial application of local laws nor the problem of discrimination against intercity commerce.

Shell and several related cases are concerned primarily with the *method* of taxation; local taxes on a specified activity must be apportioned based on the amount of such activity conducted within and outside city boundaries. Such apportionment ensures that a local government does not apply its tax laws to extraterritorial activity and thus expose a business to double tax liability for the same activity. *See id.* at 118, 480 P.2d at 959, 93 Cal.Rptr. at 7. For example, in *Shell* the court invalidated a city business tax based on total gross receipts from a company's sales activities both within and outside the city. *Id.* at 124-26, 480 P.2d at 963-65, 93 Cal.Rptr. at 11-13. In *City of Los Angeles v. Belridge Oil Co.*, 42 Cal.2d 828, 831, 271 P.2d 5, 10 (1954), the court held that a city could tax the activity of selling within the city in spite of various extraterritorial events that contributed to such receipts. In *Carnation Co. v. City of Los Angeles*, 65 Cal.2d 36, 38-40, 416 P.2d 129, 130-32, 52 Cal.Rptr. 225, 226-28 (1966), the court upheld a city tax on manufacturing, processing, or handling goods within its boundaries that was based on the amount of gross receipts from sales of those goods. Finally, in *Volkswagen Pac., Inc. v. City of Los Angeles*, 7 Cal.3d 48, 58-59, 496 P.2d 1237, 1244-45, 101 Cal.Rptr. 869, 876-77 (1972), the court held that a city tax on wholesale selling activity that reached all gross receipts must be apportioned so as to exclude extraterritorial selling activities.

In this case, Santa Monica's proposed fee does not "depend upon a factor which bears no fair relationship to

the proportion of the taxed activity taking place within the taxing jurisdiction." *Shell*, 4 Cal.3d at 124, 480 P.2d at 963, 93 Cal.Rptr. at 11. The proposed flat fee is indifferent to the area or number of miles the pipeline traverses outside the city's boundaries, the volume of oil that passes through the pipeline, and Shell's receipts from its petroleum sales. Shell has not met its burden of showing that this formula has extraterritorial application. *See Shell* 4 Cal.3d at 126, 480 P.2d at 965, 93 Cal.Rptr. at 13 (holding that a plaintiff must show by " 'clear and cogent evidence' " that an apportionment formula in fact taxed extraterritorial activity or values) (quoting *Butler Bros. v. McColgan*, 315 U.S. 501, 507, 62 S.Ct. 701, 704, 86 L.Ed. 991 (1942); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2505, 2513, 91 L.Ed. 2d 202 (1986) (holding that at summary judgment "the judge must view the evidence presented through the prism of the substantive evidentiary burden").

Shell advances a far broader meaning of extraterritorial application of local law that includes "extraterritorial effect." It argues that, because Santa Monica's actions may have an impact on areas outside its boundaries (such as causing Shell to decide to put its pipeline through another city), Santa Monica is thereby applying its law beyond its boundaries. Any action by a city, such as the enactment of a zoning ordinance or a decision to raise property taxes, will have extraterritorial impacts in this sense. Inaction, for that matter, would also have such extraterritorial effects. Nothing in *Shell*, the related cases, or the text of article XI, § 7 supports such a sweeping interpretation of the concern for extraterritorial application of local law.

The core of Shell's argument under the state constitution concerns the amount of the fee, not its formula. Thus, the argument must proceed on the basis of the *Shell* court's second concern, intercity discrimination. This concern

would prohibit a city from setting higher fees for intercity than for intracity oil pipelines. As discussed above, however, Shell has not established that Santa Monica has imposed franchise fees on a discriminatory basis. *See supra* pp. 1057-58 & n. 7.[9] We therefore affirm the district court's grant of summary judgment on the state constitutional issue.

III. *The Preemption Issue*

A. Ripeness

On cross-appeal, Santa Monica argues that the preemption issue is not ripe because, at this stage of the negotiations, it is not clear whether a new franchise agreement, if ever executed, will contain particular safety requirements that conflict with federal or state law. Santa Monica mischaracterizes Shell's primary challenge. Shell requests a declaratory judgment that Santa Monica may not impose *any* safety standards. That issue is ripe.

The doctrine of ripeness "prevents courts from deciding theoretical or abstract questions that do not yet have a concrete impact on the parties." *Assiniboine & Sioux Tribes v. Board of Oil & Gas Conservation*, 792 F.2d 782, 787 (9th Cir. 1986). The doctrine requires an inquiry into " 'the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration.' " *Trustees for Alaska v. Hodel*, 806 F.2d 1378, 1381 (9th Cir. 1986) (quoting *Abbott Laboratories v. Gardner*, 387 U.S. 136, 149, 87 S.Ct. 1507, 1515, 18 L.Ed. 2d 681 (1967)). Hence, ripeness is " 'peculiarly a question of timing' " that requires

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[9] A fairly apportioned tax may be high as long as it is not confiscatory. *See General Motors Corp. v. City of Los Angeles*, 5 Cal.3d 229, 243 n. 17, 486 P.2d 163, 172 n. 17, 95 Cal.Rptr. 635, 644 n.17 (1971). Shell has not alleged that the fee is confiscatory.

a court to "look at the facts as they exist today in evaluating whether the controversy . . . is sufficiently concrete to warrant [judicial] intervention." *Assiniboine*, 792 F.2d at 788 (quoting *Buckley v. Valeo*, 424 U.S. 1, 114-17, 96 S.Ct. 612, 680-81, 46 L.Ed.2d 659 (1976)).

The preemption issue posed by Shell is ripe for review because the disagreement over whether Santa Monica may impose any safety standards is clearly framed by the facts of this case. The city has unambiguously indicated its resolve to require at least some safety standards in the new franchise agreement. This issue has a concrete impact on the parties because the safety standards represent a major obstacle to the execution of a new agreement. The issue is not unripe because a mere possibility exists that a final agreement might not contain any safety standards or that no franchise would be granted at all. *See National Basketball Ass'n v. SDC Basketball Club, Inc.*, 815 F.2d 562, 565-66 & n. 2 (9th Cir. 1987). We conclude that the question whether Santa Monica may impose any safety standards in the new franchise agreement is ripe. *See California Coastal Comm'n v. Granite Rock Co.*, ___ U.S. ___, 107 S.Ct. 1419, 94 L.Ed.2d 577 (1987) (no ripeness problem noted in suit seeking declaration that federal law preempted a state agency from imposing *any* environmental standards in a mining permit, even though plaintiff had not secured a permit).[10]

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[10] We do not decide whether a challenge to the inclusion of any particular safety standard in the franchise agreement would be ripe. Shell has not challenged any particular standards. *See Granite Rock*, 107 S.Ct. at 1432 (refraining from deciding whether any particular standards that might be imposed in a future permit would conflict with federal law).

B. The Municipal-Proprietor Exemption from Preemption

Santa Monica contends that preemption analysis should not apply to its attempt to impose safety standards in its franchise agreement with Shell under the "municipal-proprietor" exemption. This theory stems both from the idea that preemption is a supremacy clause doctrine governing the actions of two sovereigns in our federal system, which does not apply to the actions of a private individual, and from practical concerns that a municipality, when acting as a proprietor, may have good reason to protect itself from liability resulting from the actions it authorizes. *See Santa Monica Airport Ass'n v. City of Santa Monica*, 659 F.2d 100, 103-04 & n.5 (9th Cir. 1981). Three appellate courts have suggested the existence of such a theory. *See City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 635-36 n. 14, 93 S.Ct. 1854, 1860-61 n.14, 36 L.Ed.2d 547 (1973) ("[A]uthority that a municipality may have as a landlord is not necessarily congruent with its police power. We do not consider here what limits, if any, apply to a municipality as a proprietor."); *Santa Monica Airport Ass'n*, 659 F.2d at 103-04 (noting "municipal-proprietor exemption from federal preemption," but holding that Congress did not intend to preempt a municipality from imposing noise standards at its own airport); *British Airways Bd. v. Port Auth.*, 558 F.2d 75, 83-84 (2d Cir. 1977). The theory proceeds on the premise that a private landowner may grant an easement to a pipeline operator on condition of compliance with safety standards that are more stringent than federal law.

The key inquiry under the municipal-proprietor exemption would be to determine whether Santa Monica is acting in a regulatory or proprietary capacity. As discussed in the context of the market participant exception, a city may not

use the guise of privity of contract to conduct otherwise forbidden regulatory activity. *See Wunnicke,* 467 U.S. at 97, 104 S.Ct. at 2245. Similarly, in the municipal-proprietor setting, a city may not condition a franchise renewal upon the settlement of a labor dispute, because such action is tantamount to regulating third-party relations preempted by federal labor law. *See Golden State Transit Corp.,* 106 S.Ct. at 1400-01; *see also Gould Inc.,* 106 S.Ct. at 1062-64 (holding that a state may not prohibit state purchases from repeat labor law violators because federal law preempts labor law enforcement). Presumably, our inquiry would involve a pragmatic judgment as to whether Santa Monica was attempting to regulate third-party relations in the market as in *Wunnicke, Golden State Transit,* and *Gould,* or whether its actions to limit exposure to municipal liability were sufficiently tied to the "immediate transaction." *Cf. Wunnicke,* 467 U.S. at 98, 104 S.Ct. at 2246 (noting that "simply as a matter of intuition a state market participant has a greater interest as a 'private trader' in the immediate transaction than it has in what its purchaser does with the goods after the State no longer has an interest in them"). However, we need not decide these close questions because, as discussed below, we conclude that federal law does not preempt Santa Monica from imposing all safety standards in a franchise agreement for an intrastate pipeline.

C. *The Hazardous Liquid Pipeline Safety Act*

The district court held that the Hazardous Liquid Pipeline Safety Act of 1979 ("HLPSA"), 49 U.S.C.A. §§ 2001-2014 (Supp.1987), preempts Santa Monica from imposing all safety standards on an *intra*-state pipeline. Our review of this legal conclusion is de novo. *Humboldt Oil Co. v. Exxon Co.,* 823 F.2d 373, 374 (9th Cir. 1987). We

determine the scope of federal preemption in an area by applying the traditional two-pronged inquiry:

> If Congress evidences an intent to occupy a given field, any state law falling within that field is pre-empted. If Congress has not entirely displaced state regulation over the matter in question, state law is still pre-empted to the extent it actually conflicts with federal law, that is, when it is impossible to comply with both state and federal law, or where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress.

Granite Rock, 107 S.Ct. at 1425 (quoting *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248, 104 S.Ct. 615, 621 (1983) (citations omitted); *see also California Fed. Sav. & Loan Ass'n v. Guerra*, — U.S. — , 107 S.Ct. 683, 689, 93 L.Ed. 2d 613 (1987) (preemption where there is (1) express statement, (2) sufficiently comprehensive regulation to infer that Congress left no room for state regulation, or (3) conflict).

As noted in our discussion of ripeness, this appeal concerns only the first prong. Hence, as in *Granite Rock*, we must search for some express statement or other clear indication of congressional intent to preempt Santa Monica's attempt to impose all safety standards. *See Granite Rock* 107 S.Ct. at 1426 ("[I]t is appropriate to expect an administrative regulation to declare any intention to pre-empt state law with some specificity."); *id.* at 1432 (applying traditional analysis of search for "a congressional expression of intent to preempt"). Although the search for evidence of congressional intent to preempt all state regulation can be an imprecise undertaking, we believe that

the provisions of the HLPSA do not support the district court's conclusion.[11]

The HLPSA directs the Secretary of Transportation to establish "minimum Federal safety standards for the transportation of hazardous liquids and pipeline facilities." 49 U.S.C. App. § 2002(a) (1982). The statute expressly preempts states from imposing any additional safety standards in *inter*state pipelines: "No State agency may adopt or continue in force any safety standards applicable to interstate pipeline facilities or the transportation of hazardous liquids associated with such facilities." *Id.* § 2002(d). However, the act expressly permits additional state regulation of *intra*state pipelines: "*Any State agency* may adopt additional or more stringent safety standards for intrastate pipeline facilities and the transportation of hazardous liquids associated with such facilities, if such standards are compatible with the Federal standards issued under this chapter." *Id.* (emphasis added).

This distinction between interstate and intrastate pipeline facilities parallels the one made in the Natural Gas Pipeline Safety Act of 1968 ("NGPSA"), 49 U.S.C.A. §§ 1671-1686 (1976 & Supp. 1987), on which the HLPSA was modeled. *See* H.R.Rep. No. 97-89 (Pt. I), 97th Cong. 2d Sess. 2, *reprinted in* 1982 U.S.Code Cong. & Admin. News 4480, 4481; S.Rep. No. 96-182, 96th Cong., 1st Sess. 5, *reprinted*

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[11] The district court itself did not engage in the kind of searching inquiry undertaken in *Granite Rock*. Instead, it relied on two letters prepared by a California state deputy attorney general and a Department of Transportation official. These letters incorrectly assumed that the existence of congressional power to regulate all pipelines that affect interstate commerce means that Congress has preempted all state and local regulation, subject only to such delegation of its authority as it may indicate.

in 1979 U.S. Code Cong. & Admin.News 1971, 1975, 1989. The House report for the NGPSA explained:

> The relationship of Federal-State regulatory authority created by this bill differs as between local pipelines and interstate transmission lines. In the latter area, the lines of a single transmission company may traverse a number of States and uniformity of regulation is a desirable objective. For this reason, section 3 provides for a Federal preemption in the case of interstate transmission lines.
>
> On the other hand, in the case of local lines . . ., States may establish additional or more stringent standards, provided they are not inconsistent with the Federal minimum standards. The committee has provided for this different treatment because each State authority is uniquely equipped to know best the special aspects of local pipeline safety which are particularly applicable to that community.

H.R.Rep. No. 1390, 90th Cong., 2d Sess., *reprinted in* 1968 U.S. Code Cong. & Admin. News 3223, 3241; *see id.* at 3236.

In this case, the district court determined, and the parties agree, that whether the pipeline is interstate or intrastate in this case turns on a disputed issue of fact — the shipper's intent. *See Burlington Northern, Inc. v. Weyerhaeuser Co.*, 719 F.2d 304, 307-10 (9th Cir. 1983). Viewing the evidence in the light most favorable to Santa Monica, the district court assumed that the pipeline was intrastate.[12] Thus, Shell

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[12] The HLPSA regulations define an interstate pipeline as "a pipeline or that part of a pipeline that is used in the transportation of hazardous liquids in interstate or foreign commerce." 49 C.F.R. § 195.2 (1986). An

would be entitled to summary judgment on the federal preemption issue only if Santa Monica is *not* "[a]ny State agency" under 49 U.S.C. App. § 2002(d) (1982).

The HLPSA does not define the term "State agency." The two letters on which the district court relied[13] argued that "State agency" in § 2002(d) means "state" as opposed to "municipal" or "local." This reading has two significant problems. First, the HLPSA itself specifically contemplates that "municipalities" may be "State agencies." *See* 49 U.S.C.App. § 2012(a)(9)(A), § 2012(a)(10)(A) (1982); *cf. id.* § 1674(a) (same under the NGPSA). Second, applying the restrictive reading of "State agency" to the sentence in § 2002(d) concerning *inter*state pipelines leads to the anomalous conclusion that the HLPSA preempts state-level agencies from regulating interstate pipelines, while saying nothing about municipalities or other local bodies. The only sensible reading of this provision is that the HLPSA

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intrastate pipeline is defined as "a pipeline or that part of a pipeline to which this part applies that is not an interstate pipeline." *Id.* An appendix states that a pipeline that begins off-shore on the outer continental shelf and enters a state is an interstate pipeline. *See* 49 C.F.R. pt. 195 app. A, ex. 7 (1986). But a pipeline that merely transports oil from two points within a state may be an intrastate pipeline. *See id* ex. 1; *see also Southern Pac. Pipe Lines, Inc. v. U.S Dep't of Transp.*, 796 F.2d 539, 542 (D.C. Cir. 1986) (lateral pipelines used solely for intrastate carriage are intrastate, even if physically connected to interstate pipeline facility). Although on appeal Shell has sought to introduce a letter from a Department official stating that the pipeline is interstate, the record in this case does not conclusively establish whether the pipeline is interstate or intrastate. Thus, like the district court, we assume for the purpose of summary judgment that the pipeline is intrastate.

We note that, in the event that the pipeline is determined to be interstate, the district court would then need to address the municipal-proprietor exemption from preemption.

[13] *See supra* note 11.

preempts regulation of *inter*state pipelines by all "State agencies" — including both state and local bodies. This inclusive reading of the term "State agencies" would similarly apply to the other sentence in § 2002(d) concerning *intra*state pipelines. "Congress could not have intended the same phrase to have different meanings in two consecutive sentences." *Southern Pac. Pipe Lines, Inc. v. United States Dep't of Transp.*, 796 F.2d 539, 542 (D.C.Cir.1986) (referring to different phrase in § 2002(d)).

The district court adopted a different interpretation. It interpreted the term "State agency" in § 2002(d) to mean "[a]ny State agency" (including municipalities) to which regulatory authority had been delegated under § 2004(a). Under the HLPSA, the Secretary of Transportation must cede its authority to prescribe and enforce minimum federal standards for intrastate pipelines to a state agency that annually certifies that it has adopted and will enforce those minimum standards. 49 U.S.C.App. § 2004(a) (1982).[14] The district court's reading is also problematic. First, as in the foregoing analysis, this interpretation would result in the odd conclusion that § 2002(d) would preempt certified state agencies (whether state or municipal) from imposing additional standards on *inter*state pipelines, but would say nothing about uncertified state agencies (whether state or municipal).

Second, the bare fact is that § 2002(d) does not limit the term "[a]ny State agency" to certified state agencies. If Congress had intended to limit that term to state agencies that are certified under § 2004(a), one would have expected it to have done so expressly. Other provisions in the HLPSA expressly limit the term "State agencies" to agencies that are certified. *See, e.g., id.* §§ 2002(h), 2004(d)(1), 2009(a),

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[14] California has designated its state fire marshal to be such a certified state agency. Cal.Gov't Code § 51010 (West Supp.1987)

2012(a)(9)(A), 2014(b)(1). Other provisions refer to a "State agency" that is not certified under § 2004(a). *See id.* §§ 2004(b), 2004(g), 2012(a)(10)(A). The passages in the legislative history discussing additional, compatible state standards do not restrict the authority to issue such standards only to state agencies that have been certified; the legislative reports acknowledge broadly, and without qualification, that states may impose additional, compatible standards. *See* H.R.Rep. No. 99-121 (Pt. I), 99th Cong., 2d Sess. 2, *reprinted in* 1986 U.S. Code Cong. & Admin.News 4978, 4979; H.R.Rep. No. 98-780 (Pt. I), 97th Cong., 2d Sess. 2, *reprinted in* 1982 U.S. Code Cong. & Admin.News 4480, 4481. We acknowledge that some ambiguous evidence exists that at least would suggest a contrary conclusion. *See* 49 C.F.R. pt. 195 app. A, at 635 (1986); *Southern Pac. Pipe Lines*, 796 F.2d at 540 (suggesting in dicta, without discussion, that a state may impose additional safety standards on intrastate lines only after it has been certified under § 2004). For example, the appendix to the hazardous pipeline regulations states:

> [T]he HLPSA provides for a national hazardous liquid pipeline safety program with nationally uniform minimum standards and with enforcement administered through a Federal-State partnership. The HLPSA leaves to exclusive Federal regulation and enforcement "interstate pipeline facilities". . . . For . . . "intrastate pipeline facilities," the HLPSA provides that the same Federal regulation and enforcement will apply unless a State certifies that it will assume those responsibilities. A certified State must adopt the same minimal standards but may adopt additional more stringent standards so long as they are compatible.

49 C.F.R. pt. 195 app. A, at 635 (1986). One fair reading of this passage is that the Department of Transportation believes that the HLPSA provides for *exclusive* federal authority over intrastate pipelines, unless a state agency is certified. However, the passage may also reflect nothing more than the uncontested point that the HLPSA provides for exclusive *minimum* federal regulation and enforcement, unless a state agency is certified. *See also* 50 Fed. Reg. 39,013 (similar ambiguous passage). We do not believe that this ambiguous passage provides a clear indication of the Department's position on the issue posed in this case. We express no view on the extent to which a contrary interpretation of the HLPSA by the Department would affect our own interpretation of the HLPSA.

The Department's stated policy is "to allow states to assume as much responsibility for pipeline safety within their states as possible, subject only to the limitations of the HLPSA." 50 Fed. Reg. 39,008, 39,011 (1985); *see also* 49 U.S.C. App. § 2014(f) (1982) (providing that a violation of "any safety standard or practice of any State" shall be a violation of federal law "only to the extent that such standard or practice is not more stringent than the comparable Federal safety standard"); *cf. United Gas Pipeline Co. v. Terrebonne Parish Police Jury,* 319 F.Supp. 1138, 1139-42 (E.D.La. 1970) (holding that the NGPSA preempts state political subdivisions from regulating *inter*state gas pipelines, but observing in dicta that a local body could impose a compatible safety ordinance on local transmission lines), *aff'd per curiam,* 445 F.2d 301 (5th Cir.1971). Finally, the HLPSA authorizes the Secretary

> to consult with, and make recommendations to . . . State *and local* governments . . . for the purpose of developing and encouraging activities, *including the enactment of legislation,* . . . to

> improve State *and local pipeline safety programs* relating to hazardous liquids.

49 U.S.C. App. § 2011(c) (1982) (emphases added). Thus, we see no apparent reason to give the unrestricted term "[a]ny State agency" in § 2002(d) the restricted meaning of "[a]ny certified State agency."

[5] The district court's conclusion that the HLPSA preempts municipalities (or other noncertified state agencies) from imposing additional, compatible safety standards on intrastate pipelines does not withstand the type of searching inquiry undertaken in *Granite Rock*. Accordingly, we hold that the HLPSA does not preempt Santa Monica from imposing all safety standards on intrastate pipelines and vacate the district court's grant of summary judgment in favor of Shell.[15] We note that our holding in no way authorizes Santa Monica to impose any particular safety standard. As in *Granite Rock*, the plaintiff's challenge to the agency's authority to impose *any* standards "was broad and absolute; our rejection of that challenge is correspondingly narrow." 107 S.Ct. at 1431. We have no occasion to decide, under the second prong of the preemption inquiry, whether the HLPSA would preempt any particular standard on the ground that it conflicts with federal law or is inconsistent with federal objectives.

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[15] Whatever preemption may exist must be rooted in the California Pipeline Safety Act ("CPSA"), Cal. Gov't Code §§ 51010-51020 (West Supp. 1987). The district court did not address the question whether the CPSA preempts local bodies, and the parties have not briefed the issue on appeal. We leave this question for further development on remand.

CONCLUSION

For the reasons discussed above, the district court's judgment in No. 86-6103 is affirmed; the proposed franchise fee does not violate the federal commerce clause or the analogous state constitutional provisions. The judgment in No. 86-6206 is vacated and remanded: assuming the pipeline is intrastate, the HLPSA does not preempt Santa Monica from imposing all safety standards. The case is remanded for consideration of whether the pipeline is interstate and whether states law preempts Santa Monica.

AFFIRMED IN PART, VACATED AND REMANDED IN PART.

WIGGINS, concurring separately:

I concur in the court's opinion, but believe that some of its unintended effects could have been resolved by a clear finding that Shell's pipeline is in interstate commerce.

For the purposes of resolving the issues raised by Shell's commerce clause arguments, the court necessarily assumes that the pipeline is operating in an interstate fashion. This was for reviewing the summary judgment against Shell. But for the purposes of resolving Santa Monica's preemption arguments, we had to assume that the pipeline was in *intra*state commerce.

What I take issue with is the court's conclusion that the record is unclear on the pipeline's status as a part of interstate or intrastate commerce. I have no doubts that, as a matter of law, it is interstate and that the Hazardous Liquids Pipeline Safety Act (HLPSA), 49 U.S.C.A. §§ 2001-2014 (Supp. 1987), preempts Santa Monica's safety regulations.

That the pipeline originates from the outer continental shelf (OCS) should be enough to validate this conclusion.

See 49 C.F.R. pt. 195, app. A & ex. 7 (1986). The fact that the pipeline connects with other pipelines which terminate in other states seems to me also to be decisive. *Id.* ex. 4. Moreover, Shell's pipeline could not really be considered as a "delivery lateral," as this term was used by another appeals court, *Southern Pac. Pipe Lines, Inc. v. United States Dep't of Transp.*, 796 F.2d 539, 541 (D.C. Cir. 1986), when it ruled that the operation in question was intrastate. *Id* at 542. Rather, it seems clear that Shell's pipeline from Ventura County to the Wilmington refinery is a trunk line, originating from the OCS, its oil already in interstate commerce. The guidelines offered by the HLPSA should be enough to make this determination and no recourse need be made to the "intentionalist" theory which the parties, apparently, believe is controlling.

I would conclude that the pipeline operates in interstate commerce. Moreover, Santa Monica would not be exempted under some "municipal-proprietor" exception to the preemption doctrine, for the same reasons stated by the court in its discussion of why Santa Monica cannot avail itself of the "market participant" exception to the commerce clause.

This case is narrow in its reasoning, as it should be. But it also sounds a clarion call to Congress for action. It is true that Congress has not prevented the disruption of interstate traffic in petroleum products which Santa Monica's imposition of rent, if it were emulated by every municipality on the pipeline's course, presents. The only check on this ominous form of over-reaching by local authorities against politically unpopular enterprises, such as oil producers, is the vague notion of proportionality of rent to services provided by the city. Santa Monica did not, I agree, cross the line in this case. But I do have my doubts whether this decision addresses an invitation to like-situated localities in California (or Nevada and Alaska, for that matter), to press

the limits of proportionality, and enter the realm of confiscation. Besides increasing prices to consumers of gasoline, the result of all this will be the "Balkanization" of the economy. This is more than a quaint and picturesque phrase describing a hypothetical danger. The Supreme Court intended it as a warning to deter the states from interfering in the national economy. *Hughes v. Oklahoma*, 441 U.S. 322, 325-26, 99 S.Ct. 1727, 1730-31, 60 L.Ed.2d 250 (1979). The danger f exorbitant rents on oil pipeline traffic and the resultant burden to commerce cannot be met in this court; it must be answered by Congress.

APPENDIX B

ENTERED
JUN 13 1986
CLERK, U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
BY DEPUTY

FILED
JUN 12 1986
CLERK, U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
BY DEPUTY

No. CV 82-2362-RJK

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

SHELL OIL COMPANY,
a Delaware corporation,
Plaintiff,
vs.

CITY OF SANTA MONICA,
a municipal corporation,
Defendant.

MEMORANDUM OF DECISION AND ORDER

I. INTRODUCTION

The essential facts in this case are uncontroverted. In 1941 the defendant, City of Santa Monica, negotiated and signed a forty year franchise agreement with the plaintiff,

Shell Oil Co.[1] Pursuant to the franchise, Shell installed and operated a pipeline 10 inches in diameter and 3.9 miles in length beneath public city streets. This segment is part of an 82.2 mile pipeline used by Shell to transport crude oil from Ventura County to its Wilmington refinery in Los Angeles County.

In 1981 the franchise came up for renewal and Santa Monica proposed two changes in the terms of the agreement: first, a rent increase from $1,000 per mile to $59,000 per mile and, secondly, incorporation of seven pages of detailed safety standards regulating the pipeline. Shell brought this action seeking, *inter alia*, a declaration (1) that the Commerce Clause of the federal constitution, as well as a similar California constitutional provision, limit the franchise fee payable to Santa Monica to an amount no greater than the value of actual services or benefits provided by the City; and (2) that any and all franchise terms regulating safety are preempted by federal law.

In their cross motions for summary judgment, now under submission, both parties agree that this case, in its present posture, presents, for the most part, pure issues of law.

II. FRANCHISE FEE

A. FEDERAL LAW

The Commerce Clause, U.S. Const. Art. I § 8 cl. 3, prevents a State from taking any action which impedes the free flow of trade between States. *Freeman v. Hewit*, 329 U.S. 249, 252, 67 S.Ct. 274, 276, 91 L.Ed. 265 (1946). However, an exception exists where the State or its political subdivision acts as a market participant. *Reeves, Inc. v. Stake*, 447 U.S. 429, 100 S.Ct. 2271, 65 L.Ed. 244 (1980);

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[1] The actual signatory was Shell's predecessor, referred to herein, for convenience, as "Shell".

Hughes v. Alexandria Scrap Corp., 426 U.S. 794, 96 S.Ct. 2488, 49 L.Ed. 270 (1976).

Santa Monica argues that the Commerce Clause places no restrictions on the price term of a franchise agreement entered into by the City itself. The City asserts that rather than regulating firms' private commercial dealings, it participates in a market transaction with a freely contracting private corporation. Santa Monica cites *White v. Massachusetts Council of Construction Employers, Inc.*, 460 U.S. 204 (1983), which held municipal contracting to be a form of market participation.

Shell relies almost exclusively on *Western Oil & Gas Ass'n v. Cory*, 726 F.2d 1340 (9th Cir. 1984), *aff'd by an equally divided court*, 471 U.S. __ , 85 L.Ed. 2d 61 (1985) ("*Cory*"), a case involving very similar facts. *Cory* held that State-owned monopolies were outside the scope of the market participant doctrine. In *Cory*, the State of California claimed to be a market participant in its dealings with several oil companies. The Ninth Circuit, however, held that a State is not protected by the market participant doctrine where it holds a "complete monopoly" over the relevant market.

The oil companies in *Cory* owned and operated offshore drilling rigs and were unable to transport crude oil onshore without passing over tidal and submerged lands owned by the State of California. Under the terms of their leases, the companies paid to California a flat annual "rent" in the amount of six percent of the appraised value of the land over which the oil passed. In 1976 California amended the rental regulations so as to: (1) increase the six percent charge to eight percent; and (2) impose a "volumetric throughput" charge which would vary the rent in direct proportion to the gallonage being piped. The court in *Cory* struck down the latter portion of the challenged regulations as violative of the Commerce Clause.

Cory held, first, that California could not invoke the market participant doctrine because it held a monopoly over coastal access and, secondly, that the commerce clause prohibits a volumetric throughput charge by which rent for the leasing of state-owned tidelands varies with the gallonage of oil shipped in interstate commerce. Shell contends that, under *Cory*, first, Santa Monica holds a monopoly which prevents it from invoking the market participant doctrine, and, secondly, the per-mile franchise fee exhibits the same constitutional defects as the per-gallon throughput charge. As discussed below in parts "1" and "2" respectively, neither of these contentions has merit.

1. Monopoly

In *Cory*, there was no practical way for the plaintiff oil companies to transport oil from their refineries without traversing the tidal and submerged lands owned by the defendant State of California. Due to the physical and practical immobility of the plaintiffs' offshore processing plants, combined with the California Stand [sic] Lands Commission's "complete monopoly" over coastal access, the oil companies in *Cory* were unable to go to any other competitors for the required strip of shoreline. They could not "shop around" but had to renew their leases on whatever terms the State demanded. For these reasons, the court in *Cory* held California was a monopolist, rather than a competitor, in the relevant market, and for that reason, the market participant doctrine did not apply.

Shell argues that it cannot "shop around," but must deal with the City and, therefore, the *Cory*, State-owned monopoly exception to the market participant doctrine applies. Santa Monica responds that more is required to prove "monopoly" than a complaint by one party to franchise renewal negotiations that it does not feel free to shop around. The city controls a four mile strip as

compared to the State control, in *Cory*, of hundreds of miles of coastline.

Moreover, the strip in issue here, unlike the California coastline, has no "strategic geographic" significance, 726 F.2d at 1345. Shell's right of way does not run east/west from Santa Monica beach inland; rather it runs north/south, parallel to, and only a few blocks from, the City's eastern boundary.

The oil producers in *Cory* faced California-owned tidal and submerged lands no matter where they looked for coastal access. In this case, by contrast, Santa Monica has shown — and, in fact, Shell has conceded[2] — the existence of a number of alternative means of transporting oil to its Wilmington refinery. Shell could obtain rights of way from private or other municipal landowners; it could negotiate exchange agreements with owners of other private pipelines; or it could use tank trucks or barges.

Shell could also pay to use common carrier pipelines which, under Cal. Pub. Util. Code § 615, have power of eminent domain. In connection with this option, the City argues that Shell is seeking the best of both worlds. If Shell prevails, and Santa Monica must renew for no more than the actual value of benefits or services the City provides, Shell will enjoy the benefits of eminent domain without the concomitant rate and regulatory restrictions imposed on common carrier pipelines. Over the forty year franchise period just expired, the volume of oil increased thirty percent and its value rose sharply; yet Shell was immune from increases in the franchise fee because the City was bound to honor the contract. Having enjoyed the benefit of

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[2] *See* Plaintiff's Opposition filed February 18, 1986 at 24: "True, Shell would have various potential options for supplying the Wilmington refinery but Shell cannot presently be certain that any of these options would be reliable."

its bargain, Shell now claims the franchise is not a contract at all but, rather, a "user" fee, and hence that, under *Cory*, the United States Constitution controls the price term.

Santa Monica makes the point that no one but the franchisor ever has power to renew a franchise; by definition, no franchisee can ever "shop around" for renewal. Only in a trivial sense may the term "monopoly" be applied to a franchisor by virtue of the fact it is the lone "seller" of renewal rights. The same reasoning applies to grantors of easements. Because land is unique, the grantee can never "shop around" for renewal of an easement. And even if the term "monopolist" is applied to Santa Monica in its role as franchisor or grantor, it still does not follow that the City could command monopoly profits because here, it is dealing with a monopsonist. Shell is the only potential "buyer" of this particular easement, or franchise, because it is connected at both ends to its existing pipeline.

Shell argues that Santa Monica enjoys tremendous leverage because the seventy eight miles of remaining pipeline are dependent on this four mile segment. Bargaining leverage does not, however, define monopoly. Rather, it tends to be a usual result of monopoly power. The four mile strip in this case could have been laid a few blocks east of its present location, avoiding Santa Monica altogether. This is quite dissimilar from *Cory*, which involved California's control over the Pacific Coast.

Moreover, the Supreme Court has explicitly rejected the view that federal constitutionality of a state levy hinges on questions of monopoly power:

> Nor do we share the appellants' apparent view that the Commerce Clause injects principles of antitrust law into the relations between the States by reference to such imprecise standards as whether one State is "exploiting" its "monopoly"

> position with respect to a natural resource when the flow of commerce among them is not otherwise impeded. The threshold questions whether a State enjoys a "monopoly" position . . . would require complex factual inquiries about such issues as elasticity of demand for other alternative sources of supply.

Commonwealth Edison Co. v. Montana, 453 U.S. 607, 619-600 n.8, 101 S.Ct. 2946, 2954-55 (1981) ("Montana").

As a matter of economics, semantics or antitrust principles, there may be room for disagreement over whether Santa Monica should be labeled a monopolist. However the issue cannot be decided by labels. *Cory* was marked by California's control, from Mexico to Oregon, of this country's western shore. In contrast, Santa Monica's control over a four mile inland strip shows that the City possesses no geographic dominance comparable to that found in *Cory*.

Shell's remaining argument for application of the State-owned monopoly exception to the market participant doctrine rests on the lack of renewal fee restrictions in the provisions of the original franchise agreement. The City is free to apply great leverage in negotiating renewal. However, the definition of monopoly for purposes of deciding constitutional claims ought not depend on the terms of a contract. As the court stated in *Montana*: "It would be strange indeed if the legality of a tax could be made to depend on the vagaries of the terms of contracts." *Id.* quoting the State court in *Montana*, 615 P.2d 847, 856

(1980). The same principle applies here.[3] Shell maintains that the terms of the agreement leave the franchisee open to exploitation. However, in arms length negotiation between parties of equal bargaining power, such a concession is presumably compensated for by other valuable consideration when the franchise is first negotiated.

In sum, the "complete monopoly" enjoyed by California in *Cory* rested on its strategic geographic dominance over relevant portions of the western shoreline of the continental United States. Here, the City does not possess any similar market dominance. Therefore, the *Cory* State-owned monopoly exception to the market participant doctrine does not apply, and Santa Monica is not prohibited from charging market value.

2. Rent vs. User Fee

Even assuming *Cory* controls and the market participant doctrine does not apply, the fee in this case "is not graduated by the amount of the business, nor . . . fixed for the privilege of doing business." *Cory*, 726 F.2d at 1344, quoting *St. Louis v. Western Union Tel. Co.*, 148 U.S. 92, 97, 13 S.Ct. 485, 487 (1893). Thus, the fee does not exhibit the unconstitutional defects found in the volumetric charge struck down in *Cory*. Instead, the flat franchise fee resembles the percent-of-appraised-value portion of the regulations challenged in *Cory*. This part of the regulation, quoted and explained, but not invalidated by *Cory*, imposed a flat charge of six percent of appraisal value as rent for the right of way. In 1976 when the volumetric surcharge was added, the flat rate was also increased to eight percent. In part "b" of the *Cory* opinion, the court struck down only

[3] The fact that *Montana*, unlike Santa Monica, denominated its charge a "tax" is not a decisive difference. *Cory* holds, "it is the practical effect of an exaction, not its label, that is the focus of analysis under the Commerce Clause." 726 F.2d at 1344.

the volumetric charge which had been designed and defended as a user fee. According to *Cory, Montana, supra,* forbids user charges, such as a gallonage charge, which bear no relation to actual use. *Cory* cited *Montana* for the proposition that "these 'user' charges cannot be disproportionate to the benefits conferred by the State." Neither the challenged franchise fee in this case, nor the six percent (later, eight percent) flat fee in *Cory,* is forbidden by *Montana.*[4]

In the portion of *Montana* relied on by both Shell in this case, and by the court in *Cory,* the Supreme Court discussed charges which are designed and defended as user fees, and noted that Commerce Clause cases have required such charges to be calculated by a formula which measures actual use. Setting that portion of *Montana* in its proper context, it becomes apparent — although *Cory* did not reach the issue — that six percent and eight percent charges were constitutionally permissible under *Montana* without any showing that they were equal to the value of State provided services or benefits.

In *Montana,* coal producers challenged a severance tax as clearly repugnant to the principles underlying the Commerce Clause. There was evidence showing the severance "tax" had been designed to manipulate "tax escalation" clauses in existing long term supply contracts between Montana producers and midwest coal-burning power plants which were dependant [sic] on low-sulphur Montana coal. 453 U.S. 641 n.6 (Blackmun, J. dissenting).

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[4] Outside the Ninth Circuit, even the volumetric throughput charge may be unobjectionable under *Montana,* since *Cory* was affirmed by an equally divided court. Santa Monica implies that Justice Powell would have upheld the charge since his opinions and concurrences strongly support the market participant doctrine. That is irrelevant, as *Cory* is fully binding on this Court.

As Montana state legislative sponsors candidly explained: "In other words, the local companies simply add the additional taxes to their bill and the entire cost is passed on to the purchasers in the midwest or elsewhere." *Id.* (quoting Towe, *Explanations of Reasons for Montana Coal Tax*, at 4). Numerous facts in *Montana* bear out the charge that the State pursued a deliberate and sophisticated "policy of 'OPEC-like revenue maximization.' " *Id.* at 643, quoting R. Nehring & B. Zycher with J. Wharton, *Coal Development and Government Regulation in the Northern Great Plains: A Preliminary Report*, 148 (1976).

The State of Montana also held a strategic geographic position and could well be considered a "monopolist," depending on the definition of the relevant market. Montana contained roughly 70 percent of all known reserves of low-sulphur coal. *Id.* at 638 n.1.

Also, in *Montana*, there was no correlation between the severance tax and the services or benefits conferred by the State. Plaintiffs had offered to prove the challenged tax of $2 per ton exacted more than 100 times the maximum amount of "legitimate local impact costs." *Id.* at 621 n.10.

Notwithstanding all of the above, the Supreme Court upheld the severance charge, emphasizing that it was "computed at the same rate regardless of the final destination of the coal." *Id.* at 618. The $59,000 per mile fee challenged here in the instant case uses an equally "evenhanded formula" since the same rate applies regardless of the destination of oil being piped.

The practical effect of the levy in *Montana* raised troubling Commerce Clause concerns. *See* 453 U.S. at 637 (White, J. concurring): "This is a very troublesome case for me, and I join the Court's opinion with considerable doubt and with the realization that Montana's levy on consumers

in other States may in the long run prove to be an intolerable and unacceptable burden on commerce."

The majority did not contest that some aspects of *Montana* raise significant concerns, but ruled that "appellants labor under a misconception about a court's role in cases such as this." 453 U.S. at 627. *See also id.* at 628: "Under our federal system, the determination is to be made by state legislatures in the first instance and, if necessary, by Congress when particular state taxes are thought to be contrary to federal interests." Thus, *Montana* tends to bear out Santa Monica's objection that more is required to prove a State-imposed burden on commerce is unconstitutional than to describe it as "undue" or "burdensome." *See also City of Pittsburgh v. Alco Parking Corporation,* 417 U.S. 369, 373, 94 S.Ct. 2291, 2294, 41 L.Ed.2d 132 (1974) (prohibitively high rate of tax constitutionally unobjectionable). The generalized sense that a State-imposed levy implicates Commerce Clause concerns is not a sufficient basis for holding the fee unconstitutional. *See Montana,* 453 U.S. at 628.

All of the foregoing serves to set in context the specific text of *Montana* which was relied upon in *Cory* and by Shell in this case. That text reads as follows:

> [W]e put to one side those cases in which the Court reviewed challenges to "user" fees or "taxes" that were designed and defended as a specific charge imposed by the State for the use of state-owned or state-provided transportation or other facilities and services. [Footnote 12 . . . Because such charges are purportedly assessed to reimburse the State for costs incurred in providing specific quantifiable services, we have required a showing, based on factual evidence in the record, that "the fees charged do not appear to be manifestly disproportionate to the services ren-

> dered. . . ." *Clark v. Paul Gray, Inc.*, 306 U.S. at 599, 59 S.Ct. at 753.]

453 U.S. at 621-22.

"Those cases" referred to in this passage all involved a user fee, akin to a toll, levied directly upon goods or persons making use of a State-owned and operated facility to move along in the stream of interstate commerce. The gallonage charge in *Cory* was one such fee. The six percent and eight percent flat fees in *Cory*, by contrast, were not designed to meter "use." Hence the court in *Cory* did not require, and California did not produce, evidence that six percent or eight percent — as opposed to two percent or ten percent — equalled the value of benefits or services provided by the State to the oil companies.

The City argues that the franchise fee in this case bears no resemblance to the classic "user fee" situation arising when an item of commerce merely passes through the jurisdiction of the taxing body. *See e.g., Evansville-Vandenberg [sic] Airport Authority v. Delta Airlines, Inc.*, 405 U.S. 707, 92 S.Ct. 1349 (1972) (head tax on enplaning passengers); *Massachusetts v. United States*, 435 U.S. 444, 98 S.Ct. 1153 (1978) (state airport flight fees); *Clyde Mallory Lines v. Alabama*, 296 U.S. 261, 56 S.Ct. 194 (1935) (state port vessel fees).

In those cases, Santa Monica contends, the *only* relationship with the taxing body was that commerce passed through the jurisdiction. In the instant case, by contrast, the City emphasizes that Shell's "taxed activity" goes far beyond the mere fact that Shell's crude passes through the City. Shell's pipeline physically and permanently occupies space in the subsurface of the City's streets.

Santa Monica goes on to point out that it negotiates many leases of City-owned facilities including, for example, space at the Santa Monica Pier and Santa Monica Airport. In

these settings, no one has ever challenged a City's right to obtain market rent.

At bottom, Santa Monica relies on the distinction between charges levied directly on persons or goods making use of State provided facilities to move in the stream of interstate commerce (e.g. petroleum gallonage, airplane passengers, highway vehicles or commercial vehicles) as opposed to charges negotiated in exchange for physical possession of State owned property granted exclusively to one private party. The per mile charge in this case is distinguishable, on that basis, from the volumetric throughput charge struck down in *Cory*. While Santa Monica's franchise fee is somewhat analogous to the six percent and eight percent flat rates in *Cory*, the court did not find them objectionable. Thus, Santa Monica's franchise fee survives Commerce Clause scrutiny.

B. STATE LAW

In evaluating the validity of the fee under the California Constitution, this Court must rule exactly as it believes the highest state court would rule, even if such decision involves the expansion of existing caselaw. *See Reding v. Texaco, Inc.*, 598 F.2d 513, 519 (9th Cir. 1979); 19 Wright Miller & Cooper, *Federal Practice and Procedure*: § 4507.

The parties correctly note that the constitutionality of the franchise fee — which is the only state law issue ripe for summary judgment — turns on the precedential value of one case: *City of Los Angeles v. Shell Oil*, 4 Cal.3d 108, 93 Cal. Rptr. 1 (1971) ("*Los Angeles*"). In brief, *Los Angeles*, and the preceding case, *City of Los Angeles v. Belridge Oil Co.*, 48 Cal.2d 320, 323 "held: The requirements of due process and equal protection compel an *apportionment* of receipts attributable to business carried on *within* and *without* the city." *Volkswagen Pacific, Inc. v. City of Los*

Angeles, 7 Cal.3d 48, 101 Cal. Rptr. 869, 877 (1978) (emphasis added).

In *Los Angeles*, the court expanded upon *Belridge*, noting that the focus of inquiry is into the sole issue of apportionment. The court explained that there are two concerns underlying this constitutional requirement: prevention of (a) extraterritorial application of local laws and (b) discrimination against intercity commerce. The principles requiring apportionment form the sum and substance of California law to be applied in this case, and are explained in the following passage:

> The foregoing review of the constellation of cases to which the *Belridge* decisions belong enables us to state with some confidence the principles which support and inform those decisions. In the first place, it is clear that in spite of the absence of a specific "commerce clause" in our state Constitution, other provisions in that Constitution — notably those provisions forbidding extraterritorial application of laws and guaranteeing equal protection of the laws — combine with the equal protection clause of the federal constitution to proscribe local taxes which operate to unfairly discriminate against intercity businesses by subjecting such businesses to a measure of taxation which is not fairly apportioned to the quantum of business actually done in the taxing jurisdiction. On the other hand, those constitutional principles do not prohibit local license taxes upon businesses "doing business" both within and outside the taxing jurisdiction; as long as such taxes are apportioned in a manner by which the measure of tax fairly reflects that proportion of the taxed activity which is actually carried on within the taxing jurisdiction, no

> constitutional objection appears. However, and conversely, no measure of apportionment can satisfy the constitutional standard if the measure of tax is made to depend upon a factor which bears no fair relationship to the proportion of the taxed activity actually taking place within the taxing jurisdiction.

Id. at 123, 93 Cal. Rptr. at 11 (emphasis added).

Predicting how the California Supreme Court would apply *Los Angeles* to this case is necessarily an imprecise undertaking. The question whether the principles of *Los Angeles* should be expanded to forbid the $59,000/mile fee is a novel question of state law.

Santa Monica distinguishes the fee as a negotiated contract term, not a tax. However, just as the California Supreme Court has struck down taxes other than the particular "gross receipts tax" invalidated in *Los Angeles*, the court could also strike down non-tax charges such as license or franchise fees if they exhibit either (a) intercity discrimination or (b) extraterritorial effect.

As matters now stand, the $59,000/mile fee could be seen to exhibit these infirmities. Under the guise of simply extracting market value for a right of way, Santa Monica may be using as leverage the 78 miles of pipeline lying beyond the four mile segment under Santa Monica streets.

However, as matters stood in 1941, Santa Monica had no such leverage. No pipe was yet laid. It was Shell who could negotiate among cities for the most advantageous terms. It may be that the nub of this case is whether to view the parties' rights as matters now stand — with Shell having invested a tremendous value in the pipeline — or *circa* 1941 when Shell voluntarily submitted to a forty year arrangement with no contractual protections for either party upon expiration.

Viewed as of the time the franchise was negotiated, Santa Monica asserts it was acting in a proprietary, not sovereign, capacity: "A franchise or license may be the product of either governmental or private action." *People ex rel. Flourney v. Yellow Cab Company*, 30 Cal.App.3d 41, 106 Cal.Rptr. 874, 878 (1973). If Shell were to sign a contract allowing it to drill under a private landowner's ground for forty years, that owner would be free to confiscate the remaining oil when the franchise expired.

For Shell to persuasively contend that the California Supreme Court would expand *Los Angeles* to invalidate this fee, it must address the following line of reasoning suggested by Santa Monica: Under the California Constitution, if the pipeline weren't already in place and Shell approached Santa Monica with an initial proposition to lay it, Santa Monica could refuse to agree to grant any right-of-way. Santa Monica should now possess the lesser included power to simply refuse to renew, regardless of price; logically, then, the right to charge a high price follows *a fortiori* from the right to refuse to deal. Shell fails to refute that Santa Monica could *initially* refuse to deal but argues Santa Monica cannot refuse *now* because the line is already in the ground. Hence, Shell is necessarily demanding more than it bargained for. Shell could have asked, and paid, for 40 or 80 or 100 years, or rights in perpetuity, or conditions limiting fee escalation upon renewal; Shell settled instead for 40 years with no protection upon renewal; the company now asks the Court to rewrite its deal. In sum, the time for a franchisee to consider the renewal problem is when it initially negotiates for the franchise. These considerations, Santa Monica concludes, would counsel against expansion of the holding of *Los Angeles*.

In 1941, Santa Monica could not have demanded an excessive fee based on leverage arising from its strategic position in relation to extraterritorial segments of the

pipeline. If Shell finds itself in a worse position now, it is only because of decisions it freely made to sign a contract and lay a pipeline. Shell has never addressed the point that its negotiating disadvantage, as connected to the extraterritorial considerations, is self-imposed.

Additionally, the thrust of *Los Angeles* can be distinguished as solely concerning the *method* of assessing taxes and nowhere addressing the *rate* of tax. A fairly apportioned tax may be high so long as it is not confiscatory. *See General Motors Corp. v. City of Los Angeles,* 5 Cal.3d 229, n.17, 95 Cal.Rptr. 635, 644 n.17 (1971). Santa Monica's method of assessing this "tax" is to negotiate the market value of the easement. Shell nowhere alleges that $59,000/mile is confiscatory. Besides, the right of way belongs to Santa Monica; it cannot confiscate what it already owns. *Los Angeles* neither forbids excessive taxes nor teaches how to define "excessive." *Los Angeles* is nowhere concerned with high taxes, only with discriminatory or extraterritorial taxes.

It appears, therefore, that the California Supreme Court would uphold this fee. The doctrine announced in *Los Angeles* draws upon the combined effect of both state and federal constitutions; as discussed above, this fee is valid under the federal constitution. Moreover, the California Supreme Court would likely reject Shell's argument that the magnitude of the fee evinces a discriminatory intent. Such an argument runs counter to "the oft-repeated principle that the judiciary should not infer a legislative attempt to exercise a forbidden power in the form of a seeming tax from the fact, alone, that the tax appears excessive or even so high as to threaten the existence of an occupation or business." *City of Pittsburgh v. Alco, supra,* at 417, U.S. 376. [sic, 417 U.S. at 376]

III. PREEMPTION OF SAFETY TERMS

By minute order of April 17, 1985, this Court ruled that Shell was not entitled to judgment on the claim that Santa Monica's proposed safety terms were preempted. Over the past year the parties have supplemented the record, and there have been significant legal developments bearing on this issue. Genuine factual disputes still prevent a finding as to whether the pipeline is "interstate" or "intrastate" as those terms are used in the Federal Hazardous Liquid Pipeline Safety Act, 49 U.S.C. § 2001 *et seq.* ("HLPSA"). However, it is now clear that, in either case, the Act does preempt Santa Monica from any and all safety regulation.

The HLPSA covers the "transportation of hazardous liquids" which are "in or affecting interstate or foreign commerce." 49 U.S.C. § 2001(3). The Act defines pipelines "in interstate or foreign commerce" as "interstate," and all other pipelines subject to the Act, namely those "affecting" interstate commerce, as "intrastate."

Santa Monica does not dispute that the Act preempts safety regulation of interstate pipelines. However, the City contends that Shell's pipeline is intrastate. This contention creates disputes of fact centered around application of the "shipper's intent" test. *See Burlington Northern v. Weyerhauser*, 719 F.2d 304 (9th Cir. 1983). As the record now stands, the interstate or intrastate character of the pipeline under the HLPSA cannot be determined. Therefore, it must be assumed, for purposes of ruling on Shell's motion for summary judgment, that this is an intrastate pipeline.

The HLPSA gives the Secretary of Transportation authority to establish safety standards for interstate and intrastate pipelines. The Secretary may, however, delegate to a "State agency" jurisdiction to prescribe safety standards for intrastate pipelines. That State agency must

submit to the Secretary an annual certification showing that it has regulatory jurisdiction, that it has adopted each minimum federal safety standard, that it is enforcing each such standard, that it is encouraging programs designed to prevent pipeline damage, and that it has authority to require certain record maintenance reporting and inspection. The term "State agency" is not specially defined in the Act, but its use in the Act clearly is limited to those State agencies to which regulatory authority has been delegated.

The federal act specifically provides that no State agency may impose any safety standards on interstate pipelines, but a State agency may adopt additional or more stringent safety standards for intrastate pipeline facilities. 49 U.S.C. § 2002(d). No State or municipal body may adopt or continue to enforce any safety regulation applicable to pipelines which affect interstate commerce unless it is a State agency to which regulatory authority has been delegated by the Secretary of Transportation.

The California legislature has determined that the State Fire Marshal is the State agency exercising the safety regulatory authority under the Federal Hazardous Liquid Pipeline Safety Act. Cal. Gov. Code §51010. On or about October 21, 1985, the State Fire Marshal obtained his certification from the Secretary of Transportation. The City of Santa Monica has not been so certified and so has no jurisdiction to regulate pipeline safety.

In a related development, the California Attorney General recently issued an opinion to the office of the State Fire Marshal. That opinion, issued January 8, 1986, concludes that a local government agency does not have power to impose safety regulations on an "intrastate" pipeline as that term is defined in the Federal Hazardous Liquid Pipeline Safety Act. That opinion appends an opinion from the U.S. Department of Transportation to the City of Long Beach, California, indicating that the

Department of Transportation takes the same view as the Attorney General. The reasoning of both the opinion of the Attorney General and the opinion of the Department of Transportation support the conclusion that Santa Monica may not regulate the safety of Shell's pipeline because the City is not a certified State agency as required under the HLPSA.

CONCLUSION

For the reasons given above, the price term in Santa Monica's proposed franchise renewal agreement does not violate the United States or the California constitution. Therefore, Santa Monica's motion for summary judgment dismissing Shell's cause of action challenging the franchise fee is hereby GRANTED. The provisions of the proposed renewal which govern safety are, however, preempted by federal law. Therefore, Shell's motion for summary judgment invalidating any and all safety terms which Santa Monica attempts to incorporate into the franchise renewal is hereby GRANTED.

The Clerk shall send, by United States mail, a copy of this Memorandum of Decision and Order to counsel for the parties.

DATED: June 11, 1986.

/s/ ROBERT J. KELLEHER
Senior District Judge

APPENDIX C

FILED
JAN 11 1988
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

Nos. 86-6103, 86-6206

USDC No. CV-82-2362-RJK

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SHELL OIL COMPANY, a Delaware corp.,
Plaintiff-Appellant-Cross-Appellee,
v.

CITY OF SANTA MONICA, a municipal corp.,
Defendant-Appellee-Cross-Appellant.

ORDER

Before: PREGERSON, NELSON, and WIGGINS, Circuit Judges.

The panel as constituted above has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no judge of the court has requested a vote on it. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

APPENDIX D

ENTERED
JUN 18 1986
CLERK, U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
BY DEPUTY

FILED
JUN 17 1986
CLERK, U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
BY DEPUTY

No. CV 82-2362-RJK

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

SHELL OIL COMPANY,
a Delaware corporation,
Plaintiff,

v.

CITY OF SANTA MONICA,
a municipal corporation,
Defendant.

JUDGMENT

In accordance with the Memorandum of Decision and Order filed June 12, 1986, defendant's motion for summary judgment dismissing plaintiff's cause of action challenging the defendant's proposed franchise fee is hereby GRANTED. Plaintiff's motion for summary judgment declaring invalid all franchise terms governing pipeline safety is hereby GRANTED.

The Clerk shall send, by United States mail, a copy of this Judgment to counsel for the parties.

DATED: June 16, 1986.

/s/ Robert J. Kelleher
Senior District Judge

APPENDIX E

HANNA AND MORTON
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Attorneys for Plaintiff
SHELL OIL COMPANY

FILED
FEB 18 1986
CLERK, U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
BY DEPUTY

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
NO. CV 82 2362-RJK (Gx)

SHELL OIL COMPANY,
a Delaware corporation,
Plaintiff,
vs.

CITY OF SANTA MONICA,
a municipal corporation,
Defendant.

STATEMENT OF GENUINE ISSUES OF FACTS SUBMITTED BY PLAINTIFF SHELL OIL COMPANY [Local Rule 7.14.2]

DATE: March 3, 1986
TIME: 10:00 A.M.
CTRM: 21

Shell Oil Company hereby submits its Statement of Genuine Issues of Fact as follows:

1. What is the maximum amount of a fee which would (a) reimburse the City of Santa Monica for the cost of any services furnished by it in connection with the operation of the pipeline, and (b) compensate the City for the reasonable value of any rights the City would surrender to Shell under the renewal franchise?

In addition, the City has suggested other issues which Shell does not believe are relevant. If the Court should determine that the issues are relevant, then the following also remain as genuine issues of fact:

2. Although the parties' safety experts recommended safety improvements to the pipeline (see defendant's Proposed Statement of Uncontroverted Facts at paragraph 18), the question of whether the recommended safety improvements were instituted and whether or not the pipeline is safe, as contended by Shell and as shown in the Declarations of William Doble and Juan Mendoza submitted by Shell in opposition to the City's motion for summary judgment, apparently remain in dispute.

3. Although at one time the pipeline transported approximately 23,700 barrels of crude oil per day as set forth in item 19 of the City's Statement of Uncontroverted Facts, in the last quarter of 1985 the pipeline transported approximately 32,862 barrels of crude oil per day, approximately 89% of which was delivered to Shell's Wilmington Refinery. Shell doubts that defendant City would controvert that fact which is established by the Declaration of Henry A. Babuszczak.

4. Although Shell does not contend that continued production at the Wilmington Refinery depends upon the continued operation of the pipeline (see defendant's Proposed Statement of Uncontroverted Facts at paragraph

27), it does contend, as set forth in the Declaration of Henry A. Babuszczak, that the pipeline does give Shell a reliable source of crude oil for the operation of the Refinery. The various alternatives available to Shell are not reliable. See Declaration of Henry A. Babuszczak.

5. Although Shell could potentially increase the supply of crude oil available to its Wilmington Refinery through exchange agreements (see defendant's Proposed Statement of Uncontroverted Facts at paragraph 30), there is no guarantee it could so do and this would not, therefore, be a reliable source of oil. See Declaration of Henry A. Babuszczak.

6. Although the pipeline is only one of six pipelines which supply Shell's Wilmington Refinery (see defendant's Proposed Statement of Uncontroverted Facts, paragraph 31), Shell is not sure that the loss of crude oil from the Ventura pipeline could be reliably made up by the remaining five pipelines. See Declaration of Henry A. Babuszczak.

7. Although the alternatives set forth in items 32, 33 and 34 of defendant City's Proposed Statement of Uncontroverted Facts potentially exist, those alternatives could not reliably supply the crude oil now carried by the Ventura pipeline. See Declaration of Henry A. Babuszczak.

8. Although most of the crude oil transported by the pipeline is produced within the State of California (see defendant's Proposed Statement of Uncontroverted Facts at paragraph 36), 45 percent is produced on the Outer Continental Shelf. See Declarations of D.J. Kingston and Henry A. Babuszczak. Shell doubts that the City will contest this fact.

9. Since 1970 the Ventura pipeline has ruptured five times, not seven times as set forth in paragraph 42 of the City's Proposed Statement of Uncontroverted Facts.

Furthermore, three of those leaks were caused by heavy equipment operators (not Shell personnel) puncturing the pipeline. With respect to the other two leaks, one occurred when the line was being pressure tested and the other leak occurred at the Santa Clara River where flooding eroded the soil around the pipeline. See Declarations of William Doble and Juan A. Mendoza.

10. Although the chances for injury are increased by reason of the facts set forth as items 45, 46, 47 and 48 of defendant's Proposed Statement of Uncontroverted Facts, the pipeline is nevertheless exceptionally safe and the sorts of hazards mentioned there occur whenever pipelines pass through an urban area. See Declaration of William Doble.

DATED: February 18, 1988

Respectfully submitted,

HANNA AND MORTON
EDWARD S. RENWICK
CYNTHIA L. BURCH
J. NILE KINNEY
MARK A. BYRNE

By /s/ EDWARD S. RENWICK

Attorneys for Plaintiff
SHELL OIL COMPANY

APPENDIX F

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Attorneys for Defendant
CITY OF SANTA MONICA.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
NO. CV 82 2362-RJK

SHELL OIL COMPANY,
a Delaware corporation,
Plaintiff,
vs.

CITY OF SANTA MONICA,
Defendant.

STATEMENT OF GENUINE ISSUES OF MATERIAL FACT [Local Rule 7.14.2, 7.14.4]

DATE: April 7, 1986
TIME: 10:00 A.M.
Courtroom: 21

Pursuant to Local Rules 7.14.2 and 7.14.4, defendant City of Santa Monica, ("City") hereby submits City's Statement of Genuine Issues of Material Fact. The City

submits this Statement only for the purpose of opposing Shell Oil Company's ("Shell's") Statement of Uncontroverted Facts filed in support of Shell's Cross-Motion for Partial Summary Adjudication. The City contends that under its theory of the case presented in the City's Motion for Summary Judgment to be heard concurrently herewith, there remain no genuine issues of material fact to be tried. The City also contends that the "uncontroverted facts" submitted by Shell do not support the conclusions of law contained in that statement.

1. What percentage of crude oil transported by the pipeline is produced on the Outer Continental Shelf. Shell currently contends that the amount is 45%; City disputes this figure based upon previous figures supplied by Shell and disputes whether the percentage can be accurately calculated given the number of changes in title to the crude between the time it is produced on the Outer Continental Shelf and the time it enters the pipeline; and given the fact that Shell admits it enters the pipeline in a "commingled stream." *See* Interrogatory Number 213, pp. 156-158; Deposition of Henry Babuszczak, pp. 160-162.

2. Whether Shell has alternatives to transporting its crude by pipeline laid in a right-of-way under the streets of Santa Monica.

3. Whether safety conditions and a higher franchise fee would place a direct and substantial burden on interstate commerce.

4. Whether refusing to franchise with Shell would place a direct and substantial burden on interstate commerce.

5. What amount reflects the fair market value of the subject right-of-way.

6. Whether the City's safety concerns are non-illusory.

7. Although it is true that the proposed franchise terms contained safety conditions (*See* Shell's Statement of

Uncontroverted Facts No. 10), the City disputes that this constitutes "regulation" of the pipeline.

8. Although it is true that the Southern California Gas Company Franchise does not contain detailed safety regulations, the city contends that the Gas Company is subject to other state regulations to which Shell is not, *see, e.g.* Public Utilities Code Sections 471, 770, and also provides a public benefit which Shell does not.

DATED: March 24, 1986

Respectfully submitted,

ROBERT M. MYERS
City Attorney

By: /s/MARY H. STROBEL
Deputy City Attorney

Attorneys for Defendant.

(8)

No. 87-1685

In the Supreme Court of the United States

October Term, 1987

SHELL OIL COMPANY,

Petitioner,

v.

CITY OF SANTA MONICA, California,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the Commerce Clause prohibit municipal lease fees for exclusive proprietary use of the subsurface of city streets from being based on a reasonable percentage of land value?

2. Does the Commerce Clause require that a lease fee charged to a company engaged in domestic and interstate commerce in crude oil be equivalent to franchise fees charged to regulated public utilities engaged in domestic and interstate commerce in other commodities?

TOPICAL INDEX

TABLE OF AUTHORITIES CITED

No. 87-1685

In the Supreme Court of the United States

October Term, 1987

SHELL OIL COMPANY,

Petitioner,

v.

CITY OF SANTA MONICA, California,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent, City of Santa Monica, respectfully submits this Brief in Opposition to the Petition for Writ of Certiorari filed by Shell Oil Company.

STATEMENT OF THE CASE

1. Statement Of Facts

Petitioner, Shell Oil Company, owns and operates a proprietary 10-inch diameter crude oil pipeline connecting gathering fields in Ventura, California, with a Shell refinery in Wilmington, California ("Ventura

pipeline"). App. A-2, B-2.[1] The pipeline lies wholly within the State. Id; CR 96:19. It is one of several viable means of transporting crude oil between these two points. App. A-10, B-4-5, E-3.

Prior to installing the line in 1941, Shell's predecessor[2] obtained leases or grants of easement from public and private entities along a preferred route. App. A-2, B-1-2. Santa Monica awarded a 40-year lease, denominated a franchise, for that portion lying beneath City streets ("Santa Monica segment"), consisting of approximately 4 miles of the 82 mile route. *Id.* The City does not regulate subsurface pipeline uses on private property. App. A-14 n.8. The lease contained no renewal provision and expired by its own terms in 1981. App. A-2.

Most of the crude oil carried in the Ventura pipeline is produced by Shell and other oil companies in gathering fields in the Ventura area. App. E-3. The line also carries crude oil produced on the Outer Continental Shelf (OCS), off the shore of Ventura, which Shell purchases through the use of "exchange agreements." App. A-3. All of Shell's Ventura drilling operations are onshore; Shell acquires title to the OCS-produced oil at the point it enters Shell's onshore pipeline in Ventura. App. A-3, CR 80:43-44, 78:92-98. At the end of the line in Wilmington, Shell "exchanges back" an amount of crude approximately equal to that purchased by exchange in Ventura. Technically, Shell has title to all crude passing

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[1]Appendix (App.) citations are to the Appendix to Shell Oil Company's Petition for Writ of Certiorari.

[2]For clarity, both Shell Oil Co. and its predecessor will be referred to as Shell.

through the line. App. A-3, CR 78:92-95.[3]

Santa Monica is bordered on the west by the Pacific Ocean, and on its other three sides by the City of Los Angeles. The Santa Monica segment runs principally north to south, just inside the City's eastern boundary. App. A-2. Because of its location in a dense urban area in proximity to Pacific Ocean beaches, the line passes beneath some of the most valuable land in North America. The line approaches within 50 feet of a city water well, rendering that water supply unusable pursuant to state law. CR 78:3. The Ventura pipe-line has ruptured five times since 1970. App. E-3.

Shell concedes the availability of other means to transport its crude oil from Ventura to Wilmington. Cert. Pet. at 3-4. Common carrier and proprietary crude oil pipelines are located in neighboring Los Angeles which are presumably available for Shell's use. App. B-5. Alternative lines could be laid in Los Angeles or along the coastal strip, which is under the control of the State Lands Commission. *See Western Oil and Gas Association v. Cory*, 726 F.2d 1340 (9th Cir. 1984), *aff'd per curiam by an equally divided court*, 471 U.S. 81 (1985). Shell's preference for the existing Santa Monica segment is its profitability. Cert. Pet. at 4.

When the franchise expired in 1981, the parties undertook negotiations for a new franchise. App. A-3, B-2. Shell proposed to pay approximately $8,500 annually. App. A-3. The City hired an independent appraiser who determined the fair rental value of the exclusive subsurface easement. He recommended a

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[3]Without these title transfers, the Ventura line might be subject to Cal. Public Utilities Code Section 216(b) (regulation of common carrier pipelines).

formula using 50% of abutting land values, capitalized at a rate of 12.5%. App. A-3. Based on a five-foot wide strip for the length of the Santa Monica segment, an annual rent of $237,000 was proposed. App. A-3; CR 78:80.[4] Neither the amount nor method of calculation has ever been controverted by Shell since it maintains that it need not pay fair value.

Shell rejected the City's proposal, protesting both the amount of the fee and the inclusion of proposed safety terms.[5] It terminated negotiations by filing this lawsuit. App. A-5. Shell and the City entered into an interim operating agreement which has allowed Shell to continue operating the line in Santa Monica. App. A-4.

2. Proceedings Below

Shell's Complaint asserted that Santa Monica was required under the Commerce Clause to grant Shell a subsurface lease at a rental not to exceed the City's actual cost of services provided, plus compensation for the reasonable value of "rights surrendered" by the City. App. A-5. The City responded that the Commerce Clause, in its dormant state, could not be invoked to compel affirmative action, such as the mandatory award of lease rights. Furthermore, the proposed lease fee was exempt from Commerce Clause scrutiny because the City was acting as a market participant. App. B-3. Finally, the fee did not discriminate against, nor constitute an

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[4]That figure was calculated in 1981. Since land values in Santa Monica have nearly doubled during the seven years of this litigation, the current rental value would be correspondingly higher.

[5]Because of concerns regarding the pipeline's advanced age, its proximity to densely populated areas, and its physical placement, the City hired an independent consultant to conduct a safety study of the line. App. A-3-4. His safety recommendations were included in the proposed lease offered by the City. App. A-4.

undue burden on, interstate commerce. App. B-12, B-13.[6]

On cross-motions for summary judgment, the District Court found the fee to be constitutionally permissible on all grounds urged by the City. The court held that the City acted as a market participant in negotiating a lease with Shell. App. B-8. It found the decision in *Cory* distinguishable because the City did not hold a monopoly position over transportation routes, as did the State in *Cory*. App. B-4-8. The Court further held that the proposed lease satisfied Commerce Clause concerns. Unlike the fee challenged in *Cory*, which included a volumetric throughput charge, the City's proposed fee was not linked to the volume of goods flowing in commerce. Instead, the rental rate was based solely on the area of land exclusively occupied by Shell's pipeline. App. B-8. Thus, the Court found the fee was more like a tax than a user fee and did not burden commerce. App. B-13. Shell filed a timely appeal.

The Ninth Circuit affirmed on the theory that the City's proposed lease fee did not violate the Commerce Clause, but reversed the lower court's ruling on the market participant doctrine. The court read its prior decision in *Cory* to create an exception for lands "held in a sovereign capacity that are recognized transportation corridors for commerce." App. A-10. Although the Court of Appeals agreed with the District Court that

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[6]Additionally, Shell claimed, and the City denied, preemption of safety terms based on Federal and California Safety Acts. Two other issues were also joined: (1) whether the City's proposed fee had extraterritorial effects, thereby violating provisions of the California Constitution; and (2) whether the City's proposed fee violated the Equal Protection Clause. None of these issues are raised in the Petition for Writ of Certiorari.

"the present case is distinguishable from *Cory*," *id.*, it nonetheless found that case controlling.[7]

The Court of Appeals analyzed the lease rent as a user fee, rather than a general revenue tax, because it was not a City-wide charge imposed on oil pipeline operators regardless of whether the pipes traveled under public or privately owned land. App. A-14 n.8. Nonetheless, the Court noted that the charge differed from traditional "user fees" because it was not assessed on goods traveling through interstate commerce. Further, it did not discriminate against interstate commerce, or adversely affect commerce by subjecting it to inconsistent regulation, the evils with which the Commerce Clause was concerned. App. A-12, A-15. Because Santa Monica's fee was based on an even-handed formula and not graduated by the amount of business done, it was not "manifestly disproportionate" to the services rendered. App. A-15.

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[7]The City has filed a Cross-Petition for Writ of Certiorari contemporaneously with this Brief, seeking review of the Court of Appeals' market participant ruling in the event Shell's petition is granted.

REASONS FOR DENYING THE WRIT

I

THE NINTH CIRCUIT DECISION IS IN HARMONY WITH DECISIONS OF THIS COURT AND LOWER COURTS REGARDING THE CONSTITUTIONALITY OF USER FEES

The Ninth Circuit's decision that Santa Monica's proposed rental fee does not offend the Commerce Clause is consistent with precedent regarding the constitutionality of both general revenue taxes and charges designated as "user fees." The Court of Appeals ruled that the proposed fee for Shell's lease was a "user fee," but as such satisfied the test articulated in *Evansville-Vanderburgh Airport Authority District v. Delta Airlines, Inc.*, 405 U.S. 707 (1972). That test was recently reaffirmed by this Court in *American Trucking Associations, Inc. v. Scheiner*, 483 U.S. ___, 107 S. Ct. 2829 (1987).

The Court of Appeals recognized that the Commerce Clause is primarily concerned with statutes that either discriminate against interstate commerce or adversely affect it by subjecting it to inconsistent regulation. App. A-12. As the cases illustrate, when a fee is levied on items of commerce passing through a jurisdiction, there is always the possibility that a similar fee may be assessed by other jurisdictions. *See Scheiner*, 107 S. Ct. at 2840. Therefore, burdens may fall inequitably on interstate commerce, giving purely local commerce, that is not subject to such cumulative charges, a competitive advantage.[8]

That was the basis for this Court's ruling in *Scheiner*. It was also the basis for the ruling in *Cory*, which involved

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[8]The issue of whether there is any "local" commerce in this case enjoying a competitive advantage is discussed in Section II, *infra*.

two types of fees. Those fees that were assessed on commerce itself, i.e., charges based on the volume of oil passing through the pipeline, were struck down. A rental fee based on land value, however, was not challenged. 726 F.2d at 1343-44. *See also Evansville-Vanderburgh Airport*, 405 U.S. at 718 (distinguishing between a tax on articles in commerce—passengers, and rent for fixed business uses).

In *Scheiner*, this Court found the state "marker fee" and "axle tax" charges assessed on trucks passing through the state to be invalid because they did "not vary directly with miles traveled or with some other proxy for value obtained from the State," and because a charge for the same service "can be imposed by other States." 107 S. Ct. at 2844. Fees assessed on commerce itself, therefore, must fairly approximate the cost or value of the use within the taxing jurisdiction so that the burden falls approximately equally on commerce passing through as it does on purely local commerce.

Shell's assertion that the Ninth Circuit's user fee analysis conflicts with precedent would be arguably apposite if the rental fee were dependent upon the volume of commerce passing through Santa Monica. *See Cory*, 726 F.2d at 1343-45.[9] It is this element which limits user fees to "a fair, if imperfect, approximation of the use of facilities for whose benefit they are imposed." *Evansville-Vanderburgh Airport*, 405 U.S. at 717. Shell applies the proportionality requirement for fees on goods in transit to the very different context of fees based on permanent presence of an activity within the jurisdiction. Where the activity is exclusive occupation of *land*, and

[9]Unlike *Cory*, the increase in volume of crude transported through the line reported by Shell (Cert. Pet. at 3) has had no effect on the City's proposed lease fee.

the fee is fixed by the amount of land used (rather than volume of goods moving in commerce), the requirement that the fee be reasonably related to the "use of facilities" is satisfied.

Even-handed charges based on "a relevant measure of actual road use," *Scheiner*, 107 S. Ct. at 2844, are valid. As recognized by the courts below, the "relevant measure" here is the square footage of land exclusively occupied by Shell. The *Scheiner* test is thus satisfied by a rental fee calculated according to a "reasonable percentage of the appraised value of the land abutting the pipeline within the City," App. A-15, or some other land based method. Neither *Scheiner* nor *Evansville-Vanderburgh Airport* limit rental fees to cost recovery. "The amount of the charges and the method of collection are primarily for determination by the State itself." *Evansville-Vanderburgh Airport*, 405 U.S. at 712-13 (upholding neutral $1 per passenger emplaning fee, half of which went to municipal treasuries). The "fair approximation" requirement, far from being a cost benefit analysis, assures that charges are levied for activity in the state and not for the privilege of moving commerce through the state. *See Scheiner*, 107 S. Ct. at 2845-46.

Where, as here, the charge is not graduated by the amount of commerce, the user fee analysis becomes similar to that applied in *Complete Auto Transit v. Brady*, 430 U.S. 274 (1977), and *Commonwealth Edison Co. v. Montana*, 453 U.S. 609 (1981), namely that the measure of the tax be reasonably related to the extent of the taxpayer's contact with the taxing jurisdiction. Applying that analysis, the focus is again on the *measure* of the fee being *reasonably related* to the pipeline's contact with the City. Since the measure of the lease fee is precisely linked to the amount of City property

being appropriated to exclusive use by Shell, the fee would also be upheld under the test applicable to general revenue taxes. Thus, the Court of Appeals' conclusion that the valuation was not "manifestly disproportionate to the services rendered," App. A-15, is not in conflict with precedent regarding the constitutionality of either user fees or general revenue taxes.

Finally, Shell attempts to create a conflict between the Ninth Circuit's decision and the decision of the Eleventh Circuit in *Arrow Airways, Inc. v. Dade County*, 749 F.2d 1489 (11th Cir. 1985). Shell reads *Arrow* to have required fees charged to airport tenants to be equal to or less than 80 percent of market level for similar property surrounding the airport for it to be reasonable under the Commerce Clause. Rather, *Arrow* merely upheld, as not being "clearly erroneous," a lower court ruling that the charges created no burden on interstate commerce. 749 F.2d at 1492. The lower court had made findings of fact which included that the airport rents charged were "below comparable level rents." That finding was not explained, nor stated to be necessary or sufficient for the ruling. The conflict with the instant case is imagined, not real.

II

THE COURT OF APPEALS' DECISION THAT SANTA MONICA DOES NOT DISCRIMINATE AGAINST INTERSTATE COMMERCE RAISES NO IMPORTANT UNRESOLVED CONSTITUTIONAL ISSUES

Shell is the only proprietary subsurface lessee in Santa Monica. App. A-12; CR 78:78-79. The Ventura pipeline is the only oil pipeline of any kind in the City. *Id.* Because the City does not favor domestically produced or consumed crude oil, or treat local oil pipelines

preferentially, the Court of Appeals held that Santa Monica does not discriminate against interstate commerce.

Shell argues, however, that Santa Monica discriminates against interstate commerce by charging a different fee to Shell than it does to two regulated public utilities. Shell believes that this raises an important and unresolved constitutional question under the Commerce Clause because it should make no difference whether the "local" commerce which is being compared to the "interstate" commerce involves a different commodity. Cert. Pet. at 19. This is an equal protection claim, which Shell asserted below, a theory which it has omitted from its Petition. Shell apparently recognizes that the equal protection analysis only invokes rational basis review (since Shell is not a member of a protected class and the issue does not involve a fundamental right), and that this Court, as did the Ninth Circuit, would find numerous rationally based distinctions justifying the disparate treatment.[10] Therefore, Shell now relies solely on the Commerce Clause, hoping in the process to benefit from the closer scrutiny given to claims of "discrimination" against interstate commerce under that clause.

The analysis of discrimination differs under the two clauses. The lower courts recognized that Shell's interstate or "local" character was totally irrelevant to the measure of the lease fee. As the Court of Appeals

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[10]The Court of Appeals noted that the public utility franchises are different from Shell's lease in important respects: public utilities provide a public benefit that Shell does not; the franchises create different types of potential City liability; and the utility franchises were not shown to have been negotiated under similar conditions as the Shell lease. App. A-13.

emphasized, the best that Shell could argue was that the burden of the fee fell on a non-local company, but that this fact did nothing to establish discrimination against interstate commerce. App. A-13. *See Commonwealth Edison*, 453 U.S. at 618 (irrelevant that fee "burden is borne primarily by out-of-state consumers"); *Exxon v. Maryland*, 437 U.S. 117 (1978) (burden falling entirely on out-of-state producers does not establish discrimination).

Shell's passing reference to *Scheiner*, and *Maryland v. Louisiana*, 451 U.S. 725 (1981) does not aid its cause. Each involved differential taxes on the same type of interstate activity. In *Scheiner*, interstate trucks registered in Pennsylvania received tax credits not available to trucks registered elsewhere. In *Maryland v. Louisiana*, natural gas produced on the Outer Continental Shelf was subject to Louisiana's "First-Use Tax" when passing through the state, yet domestic users and local uses of the gas were exempt or received offsetting credits against other taxes. In both cases, the only differentiating factor was whether the user or provider was in-state. Here, Shell has not shown that the source or destination of its oil has any relevance to the City's lease fee arrangements.

Moreover, Shell has not established that the two "preferred" public utilities are "local" or intrastate in any manner meaningful to Commerce Clause analysis, nor that Shell's interstate character is any different than theirs. By Shell's own analysis, the commodities carried by all three lessees (natural gas, electricity, and crude oil) are in interstate commerce.[11] It is true that the public utilities serve City residents, as well as others.

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[11] *See* Appellant's Opening Brief in the Ninth Circuit, p. 6 n.1.

Presumably, Shell also provides its products to local inhabitants. Shell's particular admixture of inter/intrastate commerce may pay a higher fee than some other mix, but that does not show discrimination against interstate commerce.[12]

III

THE NINTH CIRCUIT DECISION WAS AMPLY SUPPORTED BY THE RECORD

Shell asserts that the Court of Appeals improperly resolved a material issue of fact in this case regarding the fair market value of the right-of-way under City streets. Cert. Pet. at 20. Shell is mistaken in its interpretation of the Ninth Circuit's decision. As discussed in Section I, the court was not passing on the reasonableness of the *amount* of the fee, but rather the reasonableness of the *relationship* between the measure of the fee and the rights and services given up by the City. The court found that as a matter of law, the valuation was not "manifestly disproportionate to the services rendered." App. A-15.

The Court of Appeals noted that the method of valuation, a "reasonable percentage of the appraised value of land abutting the pipeline" was in the record, and not disputed by Shell. App. A-15. Thus, the record

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[12]Shell's attempted comparison of its private proprietary line with those of public utilities is particularly striking for a different and unintended reason. If Shell were operating a common carrier pipeline, it would have eminent domain rights like other utilities under state law. California Public Utilities Code Section 615. But then, Shell would have to pay *fair value* for the land appropriated. Shell asserts here that the Commerce Clause endows its private, as opposed to public, use with even greater rights than public utilities—it need pay no more than the value of services rendered by the City.

was sufficient to support the Ninth Circuit's decision; it did not improperly resolve any material factual issue.

CONCLUSION

For the above-stated reasons, the City respectfully requests that the Court deny the Petition for Writ of Certiorari.

Dated: May 9, 1988

Respectfully submitted,

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PROOF OF SERVICE BY MAIL

State of California

ss.

County of Los Angeles

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 11333 Iowa Avenue, Los Angeles, California 90025; that on May 9, 1988, I served the within *Brief in Opposition to Petition for Writ of Certiorari* in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

Clerk, United States
Supreme Court
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All parties required to be served have been served. I declare under penalty of perjury that the foregoing is true and correct. Executed on May 9, 1988, at Los Angeles, California.

Siri Ved K. Khalsa
(Original signed)

(3)

No. 87-1685

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

SHELL OIL COMPANY,
Petitioner,

vs.

CITY OF SANTA MONICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

**BRIEF AMICUS CURIAE OF
THE WESTERN OIL AND GAS
ASSOCIATION, et al.,
IN SUPPORT OF PETITIONER**

(Additional Amici Listed on Back of Front Cover)

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Atlantic Richfield Company

Chevron U.S.A. Inc.

Conoco Inc.

Edgington Oil Company, Inc.

Mobil Oil Corporation

Phillips Petroleum Company

Texaco Inc.

Union Pacific Resources Company

Unocal Corporation

QUESTION PRESENTED

The core issue presented by this case is whether a municipality can, consistent with the Commerce Clause, charge a fee to an interstate pipeline operator for the right to pass beneath its streets that has no relation to costs incurred by the municipality or the value of the property involved.

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No. 87-1685

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BRIEF AMICUS CURIAE OF THE WESTERN OIL AND GAS ASSOCIATION, et al., IN SUPPORT OF PETITIONER[1]

INTEREST OF AMICI CURIAE

Amici Amoco Production Company, Atlantic Richfield Company, Chevron U.S.A. Inc., Conoco Inc., Edgington Oil Company, Inc., Mobil Oil Corporation, Phillips Petroleum Company, Texaco Inc., Union Pacific Resources Company and Unocal Corporation are companies that either directly or through subsidiary corporations operate

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[1] Consent letters from the parties have been filed with the Clerk.

petroleum pipelines throughout the nation. Amicus Western Oil and Gas Association is a regional trade association representing companies and individuals that conduct much of the producing, refining, transporting and marketing of petroleum in the western United States. Amici petroleum companies are members of the association. Of necessity, such companies transport large volumes of crude oil and refined petroleum products in interstate commerce through urbanized areas where the pipelines must run beneath city streets.

Historically, such subsurface corridors have been treated as an extension of the street, useful only for public transportation purposes and therefore of essentially no commercial utility. Accordingly, only a moderate fee, consistent with the greatly reduced value of property already encumbered with a street easement (and which often does little more than recover municipal administrative costs), has been charged for the right to pass. The respondent in this case, City of Santa Monica, seeks to alter that historical practice and charge for the use of land beneath its streets in accordance with the commercial value of abutting private property. This results in a fee which, in this instance, is more than 23 times higher than would result from application of a more traditional formula. If adopted by other municipalities, such an approach could have profound effects on the cost of operating petroleum pipelines and the bulk liquid transportation business.

REASONS FOR GRANTING THE WRIT

I.

SUMMARY OF ARGUMENT

The fee involved in this case would be imposed by respondent in its capacity as a trustee for the rights held by the public in city streets, rights which exist for the sole purpose of facilitating travel and commerce. Respondent is therefore acting as a market regulator rather than a participant in the market and the dormant Commerce Clause imposes a limitation on what it can charge. Because the fee is being exacted for the use of property controlled by the government in its sovereign capacity, it is to be analyzed by the courts as a "user fee."

The test this Court has repeatedly affirmed as the proper gauge for whether a user fee is excessive and therefore an unreasonable burden on commerce is whether it is a fair approximation of the *cost* to local government of providing the facility or service involved. The Ninth Circuit's conclusion that a fee based on abutting private property values satisfies this test is erroneous and in conflict with decisions of this Court. Unlike abutting property, respondent has paid nothing to acquire the street easement, including any subsurface rights, and the municipality provides no other service and incurs no other cost (other than the cost of administering the franchise) for which compensation would be appropriate.

Even if another test which has sometimes been articulated by this Court — whether the fee approximates the *value* of the facility being provided — is applied, the Ninth Circuit's conclusion is still incorrect. The value of land is a reflection of its usefulness for other purposes or by other persons. Alternative uses or users for land beneath

city streets are extremely limited due to the burden placed on the surface estate by its dedication to street purposes. Nor is there any relationship between abutting real estate prices and the value of land beneath the street. Pipeline operators using transportation corridors beneath city streets are not like tenants leasing easements through private property, which decrease the commercial value of surface use. The purpose to which transportation corridors are put, the movement of persons and goods, involves a nonexclusive use which pipeline operators enjoy in common with other members of the public. That use is not enhanced or made more valuable by the price of abutting property.

The Ninth Circuit's error appears to result from a misapplication of its own decision in an earlier case (*Western Oil and Gas Association v. Cory*, 726 F.2d 1340 (9th Cir. 1984), *aff'd per curiam by an equally divided Court*, 471 U.S. 81 (1985)), which found that fees for pipeline easements across state-owned tidal and submerged lands based on the volume of petroleum being shipped violated the Commerce Clause but indicated in dicta that, where the easements impact upon surface use for commercial purposes, such fees can be based on the appraised value of the specific land involved (*not* abutting property values).

The petition should be granted to review this error by the Ninth Circuit and correct it before the mistake is proliferated by the thousands of other municipalities and local governmental jurisdictions across the country through which interstate pipelines must pass.

II.

REVIEW IS NECESSARY TO CORRECT AN INTERPRETATION OF THE COMMERCE CLAUSE WHICH COULD RESULT IN EXORBITANT FEES FOR THE RIGHT TO TRANSPORT GOODS BY PIPELINE THROUGH URBANIZED AREAS

A. Interstate Petroleum Pipelines Must Frequently Traverse Urbanized Areas Where There Is No Alternative To Crossing Or Running Under City Streets

It has recently been estimated by the Department of Transportation that there are over 113,000 miles of interstate liquid pipelines in the United States. In 1986, almost 3 1/2 trillion barrel miles of liquid were shipped through this interstate pipeline network, a volume of trade equivalent to 19 billion miles of surface travel by tank trucks. Most of these shipments involve crude oil or refined petroleum products. As a result, 40% of the nation's annual supply of energy moves through inter and intrastate pipelines.[2]

A significant part of the interstate pipeline system is located in urbanized areas where it is not possible to avoid crossing under the grid of city streets or, if an area is already substantially built-up, along and under the street corridor itself. To illustrate this point, in 1987, the City of

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[2] Pipelines have proven to be an extremely safe way to transport these large volumes of liquid. According to the National Transportation Safety Board, pipeline shipments result in by far the fewest fatalities per billion ton-miles of cargo shipped in the United States of any transportation mode.

Los Angeles reported that there were over 500 miles of bulk liquid pipelines located beneath its streets, many if not most of which were transporting crude oil or petroleum products moving in interstate commerce. In highly urbanized areas like Los Angeles, there is no place to put pipelines other than under the streets and pipeline operators must pay whatever fee the municipality demands.

B. A Fee For The Right To Pass Based On The Price Of Real Estate Abutting City Streets Could Have Profound Effects On Pipeline Operating Costs and Transportation Decisions

As in this case, municipalities typically do not own the land beneath their streets. *Shell Oil Co. v. City of Santa Monica*, 830 F.2d 1052, 1054 (1987). They only have an easement, usually exacted from adjoining property owners in exchange for the right to develop their property, to use the surface for street purposes. This has generally been interpreted to include a sufficient amount of land beneath the surface to support street use. *Kane v. City of Chicago*, 384 Ill. 361, 57 N.E.2d 523 (1943), *rev'd on other grounds*, 392 Ill. 172, 64 N.E.2d 506 (1945); *1426 Woodward Ave. Corp. v. Wolff*, 312 Mich. 352, 20 N.W.2d 217 (1945); *Harrison County v. City of Marshall*, 253 S.W.2d 67 (Tex. Civ. App. 1952). However, as noted by one eminent authority, "[w]hatever may be the quality or quantity of the estate of the city in its streets, that estate is essentially public and not private property, and the city in holding it is considered the agent and trustee of the public and not a private owner for profit or emolument." E. McQuillin, *The Law of Municipal Corporations*, Vol. 10, 685 (3rd Ed. 1981). Furthermore, "the streets and public ways of a municipal corporation are held by it in trust for the public,

to be used for the ordinary purposes of travel and such other uses as customarily pertain thereto which, in recent years, are numerous and various." *Id.* at 762.

Use of land beneath city streets to construct and operate petroleum pipelines is a proper use. The authority to regulate streets exercised by municipalities is delegated from the state and, in California as well as many other states, the propriety of using land under public streets for pipelines is expressly confirmed by statute. *See, e.g.*, Cal. Pub. Util. Code §6202 (Deering 1970); Mich. Comp. Laws Ann. §22-1341, §22-1581 *et. seq.* (West 1988); N.J. Stat. Ann. §40-67-1 (West 1967); Tex. Rev. Civ. Stat. art. 1082 (Vernon 1963). For example, §6202 of the California Public Utilities Code expressly authorizes the legislative body of any municipality in California to grant limited rights, known as franchises, to construct and operate petroleum pipelines under its streets.

Pipeline franchises are typically limited in duration, nonexclusive, relocatable at the municipality's request, and convey no property rights in the land beneath the streets through which they pass. In actuality, they are only a license to temporarily occupy a specified amount of subsurface space.[3] Because of the tenuous nature of the rights conferred, the lack of other beneficial uses for land located immediately beneath streets, the fact that the corridors involved are dedicated exclusively to the facilitation of travel and commerce, and the significant transportation burden underground pipelines remove from surface use, such franchise rights have historically been

[3] Such temporary occupancy is necessary because of the need to physically contain bulk liquids while they are being transported. Like goods moving by truck on the surface of the street, the commodity actually being shipped is simply passing through and only occupies the subsurface space for an extremely brief period of time.

accorded a relatively modest value. Consistent with the limited value ascribed to land already burdened with a street easement, any fee imposed for the use of the subsurface corridor has usually been set at a level which does little more than attempt to recover the cost to the municipality of administering the franchise.

Typical annual pipeline franchise fees in Southern California, for example, have been set at between 1/2 cent and 2 cents per diameter inch per lineal foot of line. For general law cities in California, the annual rate for non-public utility crude oil and product pipelines is set by statute at 1/2 cent per inch per foot unless some other amount or formula is agreed upon by the operator and the municipality. *See* Cal. Pub. Util. Code §6231 (Deering 1970). It was the decision by respondent, a charter city not bound by §6231 of the Public Utilities Code, to substantially change the basis on which the annual franchise fee is calculated for the only crude oil pipeline passing through its jurisdiction that led to this litigation. Respondent proposes to charge for the land occupied by the pipeline at rates commensurate with those obtainable by an abutting private property owner if it were to lease an easement through its property which impinged upon surface commercial use.

This philosophical difference in the way land beneath city streets is to be viewed results in a strikingly different annual charge to the pipeline operator. In the case of petitioner, the difference is between $10,000, the amount its appraiser estimates Shell Oil Company would have to pay for its 10 inch diameter 3.9 mile pipeline segment under a traditional franchise fee formula, and $237,000, the fee derived by respondent based on abutting real estate values in the City of Santa Monica. *See* 830 F.2d at 1054-55. Such a shift in the way subsurface land in city streets is valued (in this case, resulting in a fee more than 23 times higher than would result from application of a more traditional formula), if

widely endorsed by other municipalities, could have profound consequences for petroleum transportation economics and affect future decisions concerning the method to be used to transport crude oil and refined products.

C. A Fee Imposed On An Interstate Pipeline For The Right To Cross Or Run Under City Streets Is Subject To Commerce Clause Scrutiny As A "User Fee"

It was established long ago that the control exercised by local government over transportation corridors, when it impacts upon interstate pipelines, is subject to Commerce Clause scrutiny. *See West v. Kansas Natural Gas Co.*, 221 U.S. 229 (1911). Given that respondent's only claim to authority over city streets is as a trustee for the public and to assure free passage, there would seem to be little question that respondent is acting as a market regulator rather than a participant.

Similarly, because the fee involved is being imposed for the use of property controlled by the government in its sovereign capacity and because it is axiomatic that the practical effect of an exaction, not its label, is to be the focus of any analysis under the Commerce Clause, *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977), *Lawrence v. State Tax Commission of State of Mississippi*, 286 U.S. 276, 280 (1932), this case falls squarely within the bounds of the Supreme Court cases addressing the propriety of so-called "user fees." In this regard, we would note that the Ninth Circuit, both here and in its earlier decision in *Western Oil and Gas Association v. Cory*, 726 F.2d 1340 (1984), *aff'd per curiam by an equally divided Court*, 471 U.S. 81 (1985), heavily relied upon by the Ninth Circuit in this case, concluded that a user fee analysis was required.

We do not contest this portion of the Ninth Circuit's decision. We believe it is correct. It is the way in which the Circuit Court performed the analysis that is problematic.

D. A Fee For The Right To Pass Under City Streets Based On The Price Of Abutting Real Estate Does Not Represent A Fair Approximation Of Local Government Costs

As this Court recently reaffirmed in *American Trucking Associations v. Scheiner*, 483 U.S. __ , 107 S.Ct. 2829, 2843-44 (1987), the principles announced in *Evansville-Vanderburgh Airport Authority District v. Delta Airlines, Inc.*, 405 U.S. 707 (1972), remain the guiding light in the area of permissible user fees. In addition to confirming that "it is the amount of the tax [or user fee], not its formula that is of central concern" and that the fee must not be "excessive in comparison with the governmental benefit conferred," the broad overriding principle that emerges from *Evansville-Vanderburgh* is that local governments may levy fees designed to help defray the cost of providing facilities or services but such charges cannot be "excessive in relation to costs incurred by the taxing authorities." 405 U.S. at 719. If they are, the user fee does not pass Constitutional muster.

In stating this test, *Evansville-Vanderburgh* builds upon a long history of decisions in which the Court has repeatedly articulated the proposition that the proper function of a user fee is to recover for the governmental entity imposing the fee what is a fair and reasonable contribution toward the cost of constructing and maintaining the public facility or providing the service involved. *See e.g., Hendrick v. Maryland*, 235 U.S. 610 (1915) (upholding registration and license fees imposed for, among other purposes, "to secure some compensation for the use of facilities provided at great

cost from the class for whose needs they are essential, and whose operations over them are particularly injurious"); and *Sprout v. City of South Bend, Indiana,* 277 U.S. 163 (1928) (disapproving a municipal registration and licensing ordinance, but reaffirming that "a state may impose, even on vehicles engaged exclusively in interstate commerce, a reasonable charge as their fair contribution to the cost of constructing and maintaining the public highways"). *Accord, Commonwealth Edison Co. v. Montana,* 453 U.S. 609, 622 n.12 (1981).

While aware of the guidance provided by *Evansville-Vanderburgh* and the cases upon which it built, the analysis performed by the Ninth Circuit in this case makes no attempt to assess whether the fee respondent proposes to impose upon petitioner for the right to pass beneath its streets represents a fair approximation of the cost to the City of providing such right. It also overlooks the fact that, given the magnitude of the fee being imposed, the only possible purpose of the exaction is general revenue generation, not cost recovery.

Unlike the abutting properties to which respondent attempts to tie the fee, the City acquired the street easements and the land beneath them at no cost to itself or its taxpayers. Because all pipeline construction expenditures, maintenance expenses and the cost of any harm inflicted upon the street surface by the line's existence must either be paid directly by the pipeline operator or reimbursed to the City, there is no other service or cost incurred by respondent for which compensation can be imposed without running afoul of Commerce Clause constraints. Although acknowledging the user fee test set forth in *Evansville-Vanderburgh,* the Ninth Circuit has simply failed to perform the required analysis.

E. A Fee For The Right To Pass Under City Streets Based On The Price Of Abutting Real Estate Does Not Approximate The Value Of The Subsurface Corridor Being Provided

Another expression of the user fee test which has been articulated in some of the cases is whether the fee imposed approximates the value of the facility or service being provided. *See, e.g., American Trucking Associations v. Scheiner,* 107 S.Ct. at 2844 ("cost or value of"). This yardstick may be a limitation on the cost recovery test reaffirmed in *Evansville-Vanderburgh* (limiting cost recovery to the value of the facility or service provided) or simply a restatement of the same test using different words (expressing the thought that cost and value are roughly equal). Its exact role is unclear.

If it is an independent test for Commerce Clause validity, it has not been met in this case. The land beneath city streets is of no commercial value to a municipality because the only rights it has in the property are for the purpose of facilitating public transit and trade. A city is not at liberty to rent or lease such rights for profit. *McQuillin, supra* at 685.[4] Since any subsurface rights that are acquired as part of the street easement are for the same purpose, such rights are

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[4] In those cases where a municipality grants an *exclusive* franchise to a public utility to run lines beneath its streets — for distribution of natural gas or electricity, for example — it is customary to impose a fee based on a percentage of the utility's gross receipts. *See, e.g.,* Cal. Pub. Util. Code §6231 (Deering 1970). Such a situation, in which the municipality may make a profit, is quite different from the granting of a *non-exclusive* franchise to a petroleum pipeline operator. Exclusive public utility distribution franchises confer a monopoly right to serve residents of the community and the fee exacted from the utility is for that privilege, not for the right to pass through.

also of no commercial value and cannot be used to generate general revenue. The only use to which the subsurface can be put by the municipality is to reduce the burden on surface traffic by allowing some of it to move below ground. That is, of course, the major benefit to a city of granting pipeline franchises — the surface is thereby freed up for other travel and transportation purposes.

If viewed instead from the perspective of the pipeline operator, there is still no correlation with abutting real estate prices. Since the value of land is determined by what it will bring in the market and that is determined by the existence of alternative uses or users who are at least theoretical competitors for the right to use the property, there is a vast difference between the value of real estate abutting a city street and the value of the street itself. Because of the infinitely greater number of uses to which the private property can be put, it is not comparable to land beneath city streets already burdened with a transportation easement. In fact, the subsurface corridor is so burdened by the surface use that it is valueless for anything but transportation (or transmission) purposes.

Nor are abutting real estate prices of even tangential relevance to the pipeline operator. The decision to use the subsurface corridor is not dictated by the operator's ability to generate rents or obtain other unique benefits due to location (what usually influences real estate values) but rather by the same considerations that motivate use of the street surface, the utility of the corridor in transporting goods from one location to another. Whether the abutting real estate is high priced and can therefore support higher rents or is of no commercial worth is irrelevant to the pipeline operator. It has no bearing on the value he places on the right-of-way beneath the street.

Consequently, whether "value" is assessed from the municipality's perspective or that of the pipeline operator,

the conclusion is the same. The price of real estate abutting the street is irrelevant to the value of the subsurface transportation corridor.

F. The Ninth Circuit's Error Appears To Result From A Misapplication Of Its Own Earlier Decision In *Western Oil And Gas Association v. Cory*

Western Oil and Gas Association v. Cory, 726 F.2d 1340 (9th Cir. 1984), *aff'd per curiam by an equally divided Court*, 471 U.S. 81 (1985), involved a challenge by certain of the amici on this brief to rental charges imposed for the use of state-owned tidelands and submerged lands which were tied to the volume of petroleum passing over the leased property. The Ninth Circuit concluded that such a "throughput charge" was not designed to compensate the state for the use of its land and that no other services or facilities were being provided for which compensation could be exacted. *Id.* at 1344. Accordingly, it determined that the throughput charge did not satisfy the *Evansville-Vanderburgh* user fee test and violated the Commerce Clause. *Id.*

In reaching its decision, the Ninth Circuit observed that the state had used a different type of leasing system before the throughput charge was enacted, a system under which rentals were based on the appraised value of the land being used (not abutting property). While the earlier system was not challenged in *Cory* and therefore was not before the Court for review, the Ninth Circuit noted by way of dicta that "California does have the right to exact compensation for conferring upon plaintiffs the right to use the real estate in question." 726 F.2d at 1344. However, it did not pass on the propriety of the specific appraisal-based rental fees

which had been imposed prior to adoption of the throughput charge.

In addition to the obvious difference between lands held in fee by the state which have commercial value and the street easements possessed by respondent in this case, the reason plaintiffs did not challenge the appraisal-based fees discussed in *Cory* becomes more apparent when an earlier state court decision in the same litigation is examined. *See Western Oil and Gas Association v. California State Lands Commission*, 105 Cal.App.3d 554, 164 Cal.Rptr. 468 (1980). That decision makes clear that the appraisal-based fees were only intended to apply to commercial and industrial sites involving surface use or which precluded rental of the surface to others for commercial purposes. 105 Cal.App.3d at 558, 164 Cal.Rptr. at 470. Consistent with historical valuation practices for subsurface pipeline corridors where surface use is not impacted (such as under a city street), the state's schedule provided for rental of pipeline rights-of-way at the rate of 1 cent per diameter inch per lineal foot. *Id. See also* Cal. Admin. Code tit. 2 §2005(b)(6) (1970).[5]

Because the Ninth Circuit apparently misunderstood the appraisal-based rental charges discussed in *Cory* and incorrectly concluded that the case had endorsed a commercial real estate value-based fee for pipeline rights-of-way under circumstances similar to those existing in this case, it failed to perform the rigorous Commerce Clause analysis mandated by *Evansville-Vanderburgh* and other

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[5] The state court decision also notes that rents for pipeline rights-of-way were increased to 1 1/2 cents per inch per foot at the time the unlawful throughput charge was adopted, thereby allowing the state to use whichever formula provided the most revenue. 105 Cal.App.3d at 559, 164 Cal.Rptr. at 470. *See also* Cal. Admin. Notice Reg. tit. 2 §2006(b)(8), Reg. 75, No. 15-Z, p.6 (1975).

decisions of this Court.[6] It should have performed that analysis and concluded that a pipeline franchise fee based on abutting property values does not result in a fair approximation of the costs being incurred or services being provided by respondent and, to the contrary, is designed solely to generate substantial general revenues for the City of Santa Monica in violation of the Commerce Clause.

CONCLUSION

For the foregoing reasons, amici respectfully urge the Court to grant the petition and correct the error committed by the Ninth Circuit before it is emulated by other jurisdictions and becomes the standard method of charging for pipeline franchise privileges throughout the United States.

DATED: May 2, 1988

Respectfully submitted,

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[6] As pointed out by petitioner in its brief in support of the petition, in reaching its decision, the Ninth Circuit also incorrectly concluded that the district court had decided an issue of fact, the fair market value of the subsurface right-of- way, which had never been presented to the trial court, and then proceeded to improperly affirm that finding. Petition for Writ of Certiorari at 11, *see* n.6 and accompanying text.

(4)

No. 87-1685

In the Supreme Court of the United States

October Term, 1987

SHELL OIL CO.,

Petitioner,

v.

CITY OF SANTA MONICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

AMICUS CURIAE BRIEF OF THE CITIES OF TORRANCE, LONG BEACH AND CARSON IN SUPPORT OF RESPONDENT

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October Term, 1987

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AMICUS CURIAE BRIEF OF THE CITIES OF TORRANCE, LONG BEACH AND CARSON IN SUPPORT OF RESPONDENT

INTEREST OF AMICI

The California cities of Torrance, Long Beach and Carson submit this brief pursuant to Supreme Court Rule 36.4 as amici curiae in support of respondent. Each amicus is an urban, California city located in Los Angeles County. Each does business with private, interstate companies, including pipeline operators.

I.

SUMMARY OF ARGUMENT

The petition for a writ of certiorari should be denied because the decision rendered by the Ninth Circuit Court of Appeals is both firmly grounded in precedent and narrowly worded. Contrary to the assertions of petitioner

and its amici, the Ninth Circuit's decision will not force private pipeline companies to pay exorbitant sums to cities for land leases. Such companies have various alternatives available to them, and their interests are amply protected by state statutes.

Petitioner advocates a constitutional reinterpretation which would radically expand the sweep of the dormant Commerce Clause by reading into it a judicially-created right on the part of private businesses to utilize government land for a nominal fee. Petitioner's novel theory would restrict the ability of state and local governments to participate in the marketplace and would move negotiations between public entities and private businesses from the bargaining table into the courts. The Ninth Circuit's decision and the facts of this case do not warrant such a departure from precedent.

If the Court nevertheless grants the petition filed by Shell Oil Company, then the Court should also grant the City of Santa Monica's cross-petition so that the Court can clarify the application of the market participant doctrine and reaffirm the sound policies which it effectuates.

II.

THE PETITION SHOULD BE DENIED BECAUSE THE NINTH CIRCUIT'S NARROW DECISION COMPORTS WITH ESTABLISHED PRECEDENT AND DOES NOT WARRANT THE RADICAL EXPANSION OF THE DORMANT COMMERCE CLAUSE SOUGHT BY PETITIONER

A. The Ninth Circuit's Holding Is Firmly Grounded In Precedent And Narrowly Limited In Its Application

The Ninth Circuit's holding comports with the guidelines this Court has established for determining whether a user fee or a general revenue tax violates the dormant Commerce Clause. Under those guidelines, a user fee must not discriminate against interstate commerce and must bear a reasonable relationship to the services rendered. *American Trucking Associations, Inc. v. Scheiner*, 483 U.S. ___, 107 S.Ct. 2829 (1987); *Evansville-Vanderberg Airport Authority Dist. v. Delta Airlines, Inc.*, 405 U.S. 707 (1972). Applying that two-pronged test, the Ninth Circuit Court of Appeals upheld Santa Monica's proposed charge as a valid user fee. App. A-15. The court explained that the charge was based on a formula which did not discriminate between intra and interstate commerce and that the charge, which was based upon abutting land value, related reasonably to the benefit conferred by the city—the exclusive use of land. *Id.*[1]

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[1] Shell asserts that a charge based upon abutting land value does not reflect the value of the land which will actually be used and therefore unconstitutional. Cert. Pet. at 15. Shell mistates the issue. As the Ninth Circuit correctly assumed, the question is whether the proposed charge reasonably relates to the value of the use—

A general revenue tax must be reasonably related to the extent of the taxpayer's contact with the taxing jurisdiction. *Complete Auto Transit, Inc. v. Brady,* 430 U.S. 274 (1977); *Commonwealth Edison Co. v. Montana,* 453 U.S. 609 (1981). In this case, Santa Monica's proposed charge for exclusive use of land is directly linked to land value and the amount of land being leased. Thus, whether analyzed as a fee or a tax, the proposed charge fulfills the requirements of the Commerce Clause; and was therefore properly upheld by the Ninth Circuit.

While basing its decision squarely upon established precedent, the Ninth Circuit chose to word its holding narrowly:

> "[W]e are unable to conclude that this valuation is 'manifestly disproportionate to the services rendered.' . . . We conclude that Shell has not met its burden at summary judgment of showing that Santa Monica has discriminated against interstate commerce. Accordingly, we affirm. . . ." App. A-15.

Because the Ninth Circuit correctly applied the standards established by the Court, this case involves no error of law which would necessitate review. Moreover, because the Ninth Circuit fashioned a narrow holding, its decision requires neither clarification nor limitation.

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not whether the two are equivalent. The Commerce Clause requires only a "fair, if imperfect, approximation of the use. . . ." *Evansville-Vanderberg Airport Authority,* 405 U.S. at 717. It does not dictate the amount of the charge. *Id.* at 712-713.

B. The Petition Should Be Denied Because It Advocates A Radical And Unprecedented Expansion Of The Constraints Imposed By The Dormant Commerce Clause Which Would Fundamentally Alter Relationships Between Interstate Companies And State And Local Governments.

The conduct of the parties in this case conforms with normal business practices. Santa Monica negotiated for full value for the exclusive use of the land beneath its streets. The fee it proposed reflects current economic realities, including the value of land in Santa Monica, the city's possible liability in the event of a pipeline rupture in the 40-year old pipeline, recent trends in franchising, and the city's need to generate revenue. See section II.C., *infra*. Petitioner sought the lowest possible charge in order to transport its crude as cheaply as possible. This is standard business conduct. What is not standard in this case is the radical departure that petitioner asks this court to make from precedent.

Petitioner would have this Court read into the constitution a judicially-created right on the part of private companies to the exclusive use of government property for a nominal fee. This expansion of the dormant Commerce Clause would effectively deprive states and cities of their recognized right to determine with whom they will deal. *See Reeves, Inc. v. Stake,* 447 U.S. at 438-439, *citing Perkins v. Lukens Steel Co.,* 310 U.S. 113, 127 (1940) ("[l]ike private individuals and businesses, the Government enjoys the unrestricted power to produce its own supplies, to determine those with whom it will deal, and to fix the terms and conditions upon which it will make needed purchases") and *United States v. Colgate & Co.,* 250 U.S. 300, 307 (1919) (referring to the longstanding right of those in

private business to exercise their independent discretion as to parties with whom they will deal). It would also restrict cities' Tenth Amendment right to control the disposition of their sovereign property in general and of their streets in particular. *See* E. McQuillan, *Law of Municipal Corporations*, Vol.10, p.763 (3d ed. 1981) (explaining that a city controls street usage and may forbid private use).

Shell would also have this court confer upon private pipeline companies the benefits of public utility status. The Ninth Circuit rejected this "discrimination" argument out of hand. App. A-12, n.7. This Court should do the same for the reasons specified by the Ninth Circuit: the public utilities in Santa Monica benefit the city's residents while Shell does not, and oil pipelines may present different hazards than utility lines and could therefore expose the city to greater liability. *Id.* Additionally, this Court should refuse to accord the benefits of utility status to petitioner because petitioner is not subject to the regulatory burdens which restrict the activities and profits of utilities. It is understandable that petitioner seeks the benefits without the burdens, but there is no precedent for interpreting the dormant Commerce Clause to accord such preferential treatment to interstate companies. Like other businesses, they must pay their own way. *Western Live Stock v. Bureau of Revenue*, 303 U.S. 250, 254 (1937).

Finally, petitioner claims an entitlement to a full trial on the issue of land value. This request raises the spectre of lengthy court trials, akin to antitrust or eminent domain proceedings, every time a city and a private interstate company are unable to agree upon contract terms. It is one thing for the federal courts to function as they have in this case, providing facial review to ensure

that proposed contract terms comport, as a matter of law, with constitutional standards. It is quite another thing for the courts to be put in the position of determining contract terms. Shell's claim that it must receive a trial on the issue of land value presages an unwarranted intrusion of the judiciary into the commercial conduct of cities and a substantial increase in the workload of the federal trial courts.

C. The Petition Should Be Denied Because It Advocates Judicially-Imposed Limitations Upon The Bargaining Process Which Would Preclude Cities From Negotiating On The Basis Of Current Economic Realities

Petitioner seeks to establish a constitutional right to a new lease on virtually the same terms as its expired lease which was granted forty-seven years ago, in 1941. The former lease simply does not reflect the realities of today's, rapidly-changing marketplace. Today, land values in urban Southern California are among the highest in the nation, and they continue to escalate. Today, cities may be held liable if pipelines beneath their streets rupture and cause injury or damage. *See, e.g., McMahan's of Santa Monica v. City of Santa Monica,* 146 Cal.App.3d 683 (1983) (holding that city was liable on inverse condemnation theory for damage to retailer suffered as a result of a ruptured water main).

Changes such as these have caused cities and other entities to re-examine and revise their practices in leasing land to pipeline operators:

> "The idea in the early days that franchises were of little value has changed, largely because of the phenomenal growth of American cities, so that now, instead of giving away franchises

> without consideration, the tendency is to protect fully the interests of the municipality, both for the present and the future, and to preserve the right to regulate the operations of the grantee of the franchise, for the protection of the municipality and its inhabitants against the possible greed of the grantee, arising from its having a monopoly." McQuillin, *supra*, Vol. 12, p.8.

Higher charges have been the inevitable result. The annual charge of between 1/2 cent and 2 cents per diameter inch per lineal foot, which petitioner's amici tout as "typical", does not reflect current economic realitites. Nor does it reflect the value of subsurface land in urban Southern California to private pipeline operators.[2]

That petitioner should seek a new lease on the advantageous terms which were acceptable to the City of Santa Monica in 1941 is understandable. That it should claim a constitutional right to these terms is not. The Commerce Clause, as consistently interpreted by this Court, does not insulate Shell from the changing conditions of the marketplace. *See Commonwealth Edison Corp. v. Montana*, 453 U.S. 609, 646 (1981) (the Commerce Clause does not secure special benefits to those engaged in interstate commerce).

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[2] For example, in 1984, appearing before the California State Board of Equalization, a real estate appraiser specializing in appraisal of pipeline easements, and appearing on behalf of oil companies, testified that amicus Mobil Oil Corporation had paid annual rates equivalent to $60.52 per lineal foot to Southern Pacific Railroad in order to obtain rights of way in amicus City of Long Beach. This rate, if applied by Santa Monica, would result in a proposed annual charge more than five times higher than the charge actually proposed by the city in this case.

D. Petitioner And Its Amici Have Exaggerated The Likely Impact Of The Ninth Circuit Court Of Appeals' Decision By Ignoring Both The Available Alternatives And The Safeguards Created By State Law.

Shell and its amici suggest that, unless this Court grants review, other cities will follow Santa Monica's lead by substantially increasing amounts charged for the use of land controlled by the cities and that such increases[1] will have dire consequences for the oil industry.[3] In fact, petitioner's prediction significantly exaggerates the probable consequences of the Ninth Circuit Court of Appeals' decision. As petitioner concedes, it has various alternatives for transporting crude oil. App. A-10, B-4-5. Thus, if dealing with a particular city becomes too expensive, a pipeline company can simply take its business to nearby cities with less expensive land. If dealing with cities in general becomes too expensive, the company can negotiate for easements with private landowners. If pipeline easements becomes too expensive, the company can transport its crude oil by truck or tanker.

Amici suggest that these alternatives are illusory or impractical and assert that, in urban areas, pipeline companies have no alternative but to pay the rents charged by cities. This suggestion distorts by omission because it fails to take into account the safeguards established by state law. The California Public Utilities Code confers the power of eminent domain upon all

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[3] As noted above, some cities and other entities have already begun to increase the amounts they charge to pipeline operators for leases, but that development reflects present economic considerations rather than judicial decisions.

utilities, including common carrier pipelines. *See* Cal. Pub. Util. Code section 610. Therefore, private pipeline operators need not engage in contractual negotiations with cities for the lease of land at all. Instead, as a matter of state law, they can simply choose to move their crude oil through common carrier pipelines, utilizing the power of condemnation to acquire the necessary land.

Moreover, as amici for petitioner acknowledge, the California Public Utilities Code affords additional protection to pipeline operators by setting the rate that general law cities may charge as pipeline franchise fees. *See* Cal. Pub. Util. Code section 6231 (establishing that the annual rate for nonpublic utility crude oil and product pipelines is 1/2 cent per inch per foot unless some other amount is agreed upon.) Thus, only the minority of California cities that have adopted their own city charters have the legal authority to engage in the kind of negotiation which occurred in this case; and those charter cities cannot renegotiate lease terms with pipeline companies until their current contracts expire.[4]

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[4] In 1985, petitioner had the franchise agreements with approximately twenty-eight California cities. Of those, only ten cities, including amicus City of Torrance, had adopted city charters, the remainder were general law cities, like amicus City of Carson.

III.

IF REVIEW IS GRANTED, THE COURT SHOULD ADDRESS THE ISSUE OF WHETHER THE MARKET PARTICIPANT DOCTRINE CONTINUES TO PROTECT A CITY'S RIGHT TO FREELY NEGOTIATE LEASES AND OTHER CONTRACTS WITH A PRIVATE COMPANIES ENGAGED IN INTERSTATE COMMERCE

Amici oppose the petition for a writ of certiorari. However, if review is granted, amici support Santa Monica's request that the Court address the question of whether the market participant doctrine continues to protect a city's right to freely negotiate in the marketplace. In doing so, the Court should, as a matter of law and policy, reaffirm and clarify the doctrine by holding that it applies to this case.

A. This Case Illustrates The Necessity Of Effectuating The Policy Considerations Underlying The Market Participant Doctrine

Throughout this century, this Court has recognized that, although the constitution constrains government action taken in the role of sovereign or regulator, the constitution does not restrict the government in its role as proprietor. *See Heim v. McCall,* 239 U.S. 175 (1915) and *Atkin v. Kansas*, 191 U.S. 207, 222-224 (1903) (when exercising a proprietary power, a state "is subject to no more limitation than a private individual or corporation would be in transacting the same business.") In the context of cases involving the Commerce Clause, recognition of this distinction in the form of the market participant doctrine "makes good sense and sound law" for several important reasons. *Reeves, Inc. v. Stake*, 447 U.S. 429, 436 (1980). First, the doctrine comports with

the purposes of the Commerce Clause and with judicial precedent. *Id.* at 437. Second, it serves to effectuate basic public policy in three crucial ways: (1) it protects state sovereignty; (2) it ensures that state and local governments enter into the marketplace on an equal footing with other participants; and (3) it allows adjustments within the marketplace between the rights of governmental entities and the rights of private businesses to be made by Congress, rather than by the courts. *Id.* at 437-438. The Ninth Circuit's ruling that Santa Monica is not a market participant should be overturned because it frustrates each of these important purposes.

In *Reeves*, the Court explained that the market participant doctrine protects state sovereignty by restricting *ad hoc* inquiry into the burdening of interstate commerce which " 'would unduly interfere with state proprietary functions if not bring them to a standstill.' " 447 U.S. at 438, n.10, *quoting American Yearbook Co. v. Askew*, 339 F.Supp. 719, 725. The Court also acknowledged that the states have a sovereign interest in retaining freedom to control their own business dealings by deciding with whom to deal and on what terms. *Id.*

This case demonstrates the necessity of maintaining the market participant doctrine in order to preserve the sovereignty of cities and states. Petitioner contends, in effect, that a city may not refuse to deal with a private company engaged in interstate commerce and, indeed, must surrender its property to that company for a nominal fee. The Court of Appeals implicitly accepted these contentions by stating that a city may not burden interstate commerce "in deciding *whether*, or on what terms, to grant a franchise. . . ." App. A-11 (emphasis

added). Thus, the Court of Appeals' decision raises questions of federalism. This Court should resolve those questions by affirming the district court's holding that the market participant doctrine applies.

This case also illustrates the dangers of denying cities an equal footing in the marketplace. *See Reeves*, 447 U.S. at 438 (explaining that states should share the same freedom from federal constraints that is enjoyed by private traders in the marketplace). As explained above in section II. C., petitioner attempts to use the Commerce Clause to shield itself from changing market conditions at the expense of cities and other public landholders. If cities are not ensured an equal footing in the marketplace and the ability to strike bargains based upon present economic conditions, they will be compelled to choose between two unacceptable alternatives: withdrawing from the marketplace or bargaining at a disadvantage. If they choose the latter alternative, cities will risk being placed in the position of subsidizing interstate companies.

This prospect is particularly ominous for California cities because "tax reform" legislation, adopted by initiative measure, has greatly restricted the power of California cities to raise revenues by taxation. *See* Calif. Constitution, Art. 13A. As a result, it is now more important than ever that this Court preserve the market participant doctrine and thereby ensure cities' ability to participate effectively in the marketplace.

In addition to preserving state sovereignty and ensuring that the government has an equal footing in the marketplace, the market participant doctrine also promotes the proper distribution of power between the courts and the legislature:

> "[T]he competing considerations in cases involving state proprietary action often will be subtle, complex and politically charged, and difficult to assess under traditional Commerce Clause analysis. Given these factors . . . as a rule, the adjustment of interests in this context is a task better suited for Congress than this Court." *Reeves,* 447 U.S. at 439.

The Court of Appeals acknowledged that this is a difficult case. App. A-8. In his concurring opinion, Justice Wiggins characterized it as having political overtones. App. A-32. The issues of law are complex, and the competing policy concerns are difficult to balance. Thus, this is exactly the type of case to which the market participant doctrine should be applied.

B. The Facts Of This Case Do Not Warrant The Creation Of A New Exception To The Market Participant Doctrine Because This Case Involves A Land Lease, Not A Recognized Transportation Corridor

Out of concern that the corridors of transportation be kept open, the Ninth Circuit effectively created a new exception to the market participant doctrine for property held in a city's "sovereign capacity":

> "[T]his case involves lands held in a sovereign capacity that are recognized transportation corridors for commerce. . . . We would find it untenable if a state or its subdivision could allocate rights to the use of publicly held transportation corridors in a manner that discriminated against interstate commerce in favor of intrastate commerce. . . .

> We therefore conclude that, following *Cory*, Santa Monica is not a market participant in the setting of franchise fees for easements under public streets." App. p.10.

However, the facts of this case do not warrant such an erosion of the protections afforded to cities and states by the market participant doctrine.

Notwithstanding the Ninth Circuit's concerns, this case involves no threat to the free flow of transportation. Santa Monica has not attempted to restrict petitioner's right to move its crude oil through that city by tanker trucks using the city streets. The land beneath Santa Monica's streets does not constitute a recognized transportation corridor to which petitioner, or any other person or entity, has a right of access. Indeed, if the land beneath the streets were, in fact, a recognized transportation corridor, it could not be leased to petitioner for its exclusive use. *See* McQuillan, *supra*, at Vol. 10 at p. 685.[5]

C. The Court Should Clarify The Ambit Of The Market Participant Doctrine By Holding That Its Application Depends Upon The Purpose And Effect Of The Challenged Governmental Action And Not Upon Mechanistic Formulas Such As The Manner By Which The Government Holds Title To Land.

The precise contours of the market participant doctrine have not yet been defined. *South-Central*

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[5] Petitioner's amici cite McQuillan, at p. 12 of their brief for the proposition that Santa Monica may not profit by leasing land beneath the streets to Shell. That citation does not provide authority for amici's argument because McQuillan discusses use of the streets themselves, not of subsurface land.

Timber Dev. v. Wunnicke, 467 U.S. 82, 93 (1984); *see* Regan, "The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause", 84 Mich. L. Rev. 1091 (1986) (noting that the Court has not yet adopted a consistent theoretical position on what constitutes market participation and suggesting that the appropriate test is the government's purpose). This case provides the Court an opportunity to clarify the ambit of the doctrine.

The Ninth Circuit based its ruling that Santa Monica was not a market participant upon a mechanistic distinction between land held in the government's sovereign capacity and land acquired through the marketplace. This distinction does not comport with the approach established by this Court which makes the applicability of the doctrine depend upon the nature of the challenged conduct. *See Reeves*, 447 U.S. at 436, n.7 (explaining that the sole inquiry in determining the applicability of the market participant doctrine is whether the challenged conduct constitutes state participation in the market) and *New England Power Co. v. New Hampshire*, 455 U.S. 331, 338-339, n.6 (1982) (explaining that market participant status depends on whether a state is regulating use and not on the manner of ownership of its property).

This established method for determining the applicability of the doctrine affords flexibility and the opportunity to reconcile conflicting interests. *See* Wills and Hellerstein, "The Governmental-Proprietary Distinction in Constitutional Law", 66 Virginia L. Rev. 1073, 1080 (1980). The Ninth Circuit's newly-created test will, in effect, prohibit the courts from evaluating competing interests and will thereby subordinate considerations of policy to convenience. Therefore, this

Court should reverse the Ninth Circuit on the market participant issue and should reaffirm that the application of the market participant doctrine depends upon the purpose and effect of the challenged conduct and not upon mechanistic formulas or labels. *See* Regan, *supra.*

IV

CONCLUSION

The Ninth Circuit's decision accords with precedent established by this Court; petitioner's radical interpretation of the dormant Commerce Clause does not. The detrimental impact which petitioner's reinterpretation of the constitution would have upon cities is real; the spectre of a drastic increase in the costs of transporting crude oil resulting from the Ninth Circuit's decision is not. Accordingly, amici respectfully urge this Court to deny the petition. In the alternative, if the petition is granted, amici request that the cross-petition also be granted so that the Court can clarify the ambit of the market participant doctrine and reaffirm that it continues to protect cities' sovereignty and ability to participate effectively in the marketplace.

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I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 11333 Iowa Avenue, Los Angeles, California 90025; that on May 10, 1988, I served the within *Amicus Curiae Brief in Support of Respondent* in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

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I declare under penalty of perjury that the foregoing is true and correct. Executed on May 10, 1988, at Los Angeles, California.

Siri Ved K. Khalsa
(Original signed)

No. 87-1685

IN THE
Supreme Court of the United States

OCTOBER TERM, 1987

SHELL OIL COMPANY,
Petitioner,

vs.

CITY OF SANTA MONICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONER'S REPLY BRIEF

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Supreme Court of the United States

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SHELL OIL COMPANY,
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CITY OF SANTA MONICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONER'S REPLY BRIEF

I.

The City Draws A Specious Distinction Between Volumetric User Fees And Fixed User Fees In Arguing That The Decision Below Does Not Conflict With Decisions Of This Court Or Any Federal Court Of Appeals And That No Material Issue Of Fact Remains To Be Tried.

The City draws a specious distinction between user fees dependent upon the volume of commerce passing through Santa Monica and the user fee based on the square footage of land used in connection with the Shell pipeline. The City correctly admits that the former type of user fee may violate

the Commerce Clause but erroneously concludes that the latter type does not. The City insists that this is so even if the square footage is multiplied not by the value of the land used but by the value of other land not shown to be used and not shown to be comparable in value to the land used. Apparently respondents believe a fixed user fee passes Commerce Clause muster so long as the square footage element of the formula is accurate. It makes no difference, according to the City, that the other half of the formula is nonsense.

The City thus argues that the amount of the fixed franchise fee is irrelevant. According to the City, all that counts is the formula. This argument is absurd. To begin with, it is absurd to say that a formula which multiplies square footage used times value per square foot is a valid formula so long as the square footage side of the equation is correct even though the value side of the formula is arbitrary and totally unrelated to the value of the land to which the formula is being applied. Next, it is absurd to say that the total amount of the fixed user fee is irrelevant. In *Evansville-Vanderburgh Airport Authority Dist. v. Delta Airlines,* 405 U.S. 707, 716-717, 31 L.Ed.2d 620, 92 S.Ct. 1349 (1972), the court clearly held that while user fees must be based upon a:

> ". . . '[U]niform, fair and practical standard' relating to public expenditures, *it is the amount of the tax, not its formula, that is of central concern.* At least so long as the toll is based on some fair approximation of use or privilege for use, . . . and is neither discriminatory against interstate commerce nor excessive in comparison with the governmental benefit conferred, it will pass constitutional muster, ..." [Emphasis added.]

The City's *amici* try to justify the amount of the fee by arguing that cities need to generate revenue and that cities

have possible liability in the event of pipeline rupture. These justifications are not well taken.

First, the cities' political inability to raise taxes from the local citizenry is not a valid reason for increasing user fees on interstate commerce. We have discussed this in section I of cross-respondent's brief in opposition to the City of Santa Monica's cross-petition for writ of certiorari in Case No. 87-1841 (filed contemporaneously herewith). We incorporate those comments here by reference.

Second, as to the *amici's* claim that the franchise puts them at financial risk, we merely point out that the franchise fee should reflect the costs incurred and benefits conferred by the City. To determine this requires a trial on a factual issue in the Federal District Court. That trial was denied to Shell when the trial court granted the City's motion for summary judgment on the theory that the City was free to charge any amount it wanted without Commerce Clause scrutiny. Had the case gone to trial on that issue, Shell would have demonstrated that the user fee is excessive in comparison to the costs incurred and benefits conferred by the City. For instance, Shell would have demonstrated that the proposed franchise contains numerous provisions which make Shell, not the City, directly responsible for maintenance, repair, insurance, relocation, indemnification and any loss incurred as a result of Shell's operation of the pipeline in Santa Monica. C.R. 92:31-40. A copy of the proposed franchise is reproduced as Appendix G to this Reply Brief. Therefore, it seems clear that any costs which accompany the presence of the pipeline fall on Shell — not on the City of Santa Monica.

Furthermore, Shell would have demonstrated the obvious — that the value of lands abutting the streets is not the same as the value of lands in the streets. The latter lands are restricted to street use; the former are not so restricted. All

other things being equal, restricted lands obviously carry a lower market value than unrestricted lands.[1]

II.

In Arguing That The Case At Bench Does Not Raise An Important Unresolved Question Concerning Discrimination Against Interstate Commerce And That No Issue Of Fact Remains To Be Tried, The City Erroneously Focuses On The Commodity Carried By The Pipeline Rather Than The Use Which The Pipeline Makes Of The Streets.

The City of Santa Monica implicitly concedes that two public utilities serving Santa Monica make the same use of the city streets as does Shell. The City also implicitly concedes that the local public utilities are in a position to pass local user fees onto the local citizenry in their rates but that Shell is not able to do so. Lastly, the City implicitly concedes that the City is charging the Shell pipeline approximately 59 times more per mile for its use of the city streets than the City charges the two utilities for their similar use. According to the City, the foregoing facts — *as a matter of law* — would not permit a finding of discrimination against interstate commerce because (1) Shell has allegedly not shown that the source or destination of its oil has any relevance to the City's user fee arrangements and (2) that the two local utilities are also

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[1] Shell did not submit an affidavit to this effect in the trial court at the hearing on summary judgment because, as we point out in section III of our petition for writ of certiorari, the statements of genuine issues of material fact filed by *both* parties conceded that if the City was subject to Commerce Clause scrutiny, the fair market value issue would have to be tried.

engaged in interstate as well as local business. Therefore, the City says, if this be a case of discrimination, it is a case of discrimination against interstate commerce in favor of interstate commerce rather than discrimination against interstate commerce in favor of local commerce.

These two arguments are invalid. First, Shell has demonstrated that the two subsurface users who deliver locally and are, therefore, in a position to pass on their user fees to the local voters, are charged low per mile user fees. On the other hand, the Shell pipeline, which does not deliver locally but merely passes through, cannot pass its user fee on to the local voters and is required to pay 59 times more for a nearly identical use of the streets. This demonstrates that the destination of Shell's oil *does* have a relevance to the City's user fee arrangement. At the very least, it ought to be a sufficient showing to survive a motion for summary judgment on the issue. If it is not, cities will be free to practice a particularly pernicious form of concealed discrimination against interstate commerce.

The City's second argument is equally erroneous. It is directly contrary to the holding of this Court in *Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318, 329, 50 L.Ed.2d 514, 97 S.Ct. 599 (1977). There, this Court determined that unreasonable discrimination against interstate commerce conducted out-of-state and in favor of interstate commerce conducted within the state violates the Commerce Clause. In the case at bench, the City has discriminated against interstate commerce that is passing through and in favor of interstate commerce conducted within the City.

CONCLUSION

For all of the reasons set forth in this Reply Brief, Shell's Petition for Writ of Certiorari, and the Brief Amicus Curiae of the Western Oil and Gas Association, et al., Shell Oil Company respectfully requests that a writ of certiorari issue to correct the decision of the United States Court of Appeals for the Ninth Circuit.

DATED: June 9, 1988

Respectfully submitted,

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APPENDIX G

DECLARATION OF RICHARD KERICK

I, RICHARD D. KERICK, declare:

1. I presently hold the position of Senior Staff Land Agent of the West Coast Division (Pipelines) - Products of Shell Oil Company. In May of 1982 I held the position of Staff Land Agent of said Division. As Staff Land Agent, my job responsibilities included participating on Shell's behalf in negotiations between Shell and the defendant City of Santa Monica concerning the terms of a long-term renewal franchise agreement to replace the pipeline franchise between Shell and the City which expired on May 8, 1981.

2. On May 18, 1982 I personally met with Mr. Robert Myers and Ms. Carol Korade, both of the Office of the Santa Monica City Attorney, to discuss a renewal franchise. At that meeting Mr. Myers gave me a draft copy of a proposed renewal franchise ordinance, a copy of which is attached hereto as Attachment "A."

3. The aforementioned proposed franchise ordinance (Attachment "A") is the most recent franchise proposal tendered to Shell by the City.

4. The facts set forth above are known to me to be true, of my personal knowledge. I am competent to testify to such facts, and if called as a witness, I could and would so testify.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 18 day of April, 1986 at Los Angeles, California.

/s/ RICHARD D. KERICK

CA:RMM:CAK:se
City Council Meeting Santa Monica, California

ORDINANCE NUMBER ______

(City Council Series)

AN ORDINANCE OF THE CITY OF SANTA MONICA GRANTING A FRANCHISE TO SHELL OIL COMPANY TO OPERATE, MAINTAIN, INSPECT, REPAIR, REMOVE AND ABANDON A PIPELINE AND APPURTENANT FACILITIES IN CERTAIN PUBLIC STREETS OF THE CITY OF SANTA MONICA

THE CITY COUNCIL OF THE CITY OF SANTA MONICA ORDAINS AS FOLLOWS:

SECTION 1. *Interpretation of Franchise.*

(a) The word "grantee" shall mean the Shell Oil Company, a Delaware Corporation, to which the franchise is granted by this Ordinance as well as its lawful successors or assigns.

(b) The words "City" shall mean the City of Santa Monica, a municipal corporation duly organized and validly existing under the general laws of the State of California with corporate power to carry on its business as it is now conducted under the statutes of the State of California and the Charter of the City.

"Attachment "A"

(c) The word "use" shall mean to operate, maintain, inspect, repair, remove, and abandon a pipeline system together with all manholes, valves, appurtenances and service connections therewith and necessary and convenient for operation of the pipeline in, under, along and across certain public streets (hereinafter collectively referred to as "highways") located in City, described as follows:

> On Twenty-sixth Street from the Northwesterly boundary of the City of Santa Monica to Colorado Avenue; thence on Colorado Avenue to Cloverfield Boulevard; thence on Cloverfield Boulevard to Ocean Park Boulevard; thence on Ocean Park Boulevard to Twenty-third Street; thence on Twenty-third Street to Dewey Street; thence on Dewey Street to Twenty-fifth Street.

(d) The word "franchise" or "franchise property" shall mean this franchise to use a pipeline system in those streets set forth in subsection (c) of this Section.

SECTION 2. *Grant of Franchise.*

The right, privilege and franchise, subject to each and all terms and conditions contained in this Ordinance to continue to use the existing pipeline for the purpose of transporting petroleum, oil, and liquid hydrocarbon products thereof and gas in those streets contained in Section 1(c) is hereby granted to grantee pursuant to the Santa Monica Municipal City Charter Section 1600.

SECTION 3. *Term of Franchise.*

This franchise shall be for a term of 10 years from the effective date of this Ordinance; however, the said franchise may be sooner terminated by voluntary surrender or abandonment by grantee, or by exercise of the power of eminent domain, by forfeiture for noncompliance with the terms and provisions hereof, by operation of any term or condition, hereof, or in the event that any provisions hereof

becomes invalid or unenforceable and the City Council expressly finds that such provisions constituted a consideration material to this Ordinance.

SECTION 4. *Compensation to the City.*

(a) Grantee shall pay to the City a fixed quarterly franchise fee of $59,250.00 on January 1, April 1, July 1 and October 1 of each year during the term of this franchise.

(b) Grantee shall pay City upon acceptance of the franchise, the sum of $253,724.00 as set forth in the Agreement entered into between the grantee and the City on June 16th, 1981, Contract Number 3654 (CCS), to cover franchise payments through June 30, 1982.

(c) The compensation provided for in Section 4(a) shall be subject to an increase on July 1, 1983, and each subsequent year during the term of this franchise ("adjustment date"). The amount of increase shall be the higher of the amount computed pursuant to the Wholesale (Primary Market) Price Index for Crude Petroleum and the Consumer Price Index for All Urban Consumers which shall be computed in the following manner:

(1) Wholesale (Primary Market) Price Index for Crude Petroleum.

The base for computing the adjustment is the Wholesale (Primary Market) Price Index for Crude Petroleum, published by the United States Department of Labor, Bureau of Labor Statistics ("Index"), which is published for the month nearest the date of the commencement of the term of this Ordinance ("Beginning Index"). If the Index published nearest the adjustment date ("Extension Index") has increased over the Beginning Index, the franchise fee for the following year (until the next adjustment) shall be set by multiplying the quarterly franchise fee set forth in Section 4(a) by a fraction, the numerator of which is the Extension Index and the denominator of which is the Beginning

Index. In no case shall this increased compensation be less than the franchise fee set forth in Section 4(a). If the Index is discontinued or revised during the term, such other government index or computation with which it is replaced shall be used in order to obtain substantially the same result as would be obtained if the Index had not been discontinued or revised.

(2) Consumer Price Index for All Consumers. The base for computing the adjustment is the Consumer Price Index for All Urban Consumers, published by the United States Department of Labor, Bureau of Labor Statistics ("Index"), which is published for the month nearest the date of the commencement of the term of this franchise ("Beginning Index"). If the Index published nearest the adjustment date ("Extension Index") has increased over the Beginning Index, the franchise fee for the following year (until the next adjustment) shall be set by multiplying the quarterly franchise fee set forth in Section 4(a) by a fraction, the numerator of which is the Extension Index and the denominator of which is the Beginning Index. In no case shall this increased compensation be less than the franchise fee set forth in Section 4(a). If the Index is discontinued or revised during the term, such other government index or computation with which it is replaced shall be used in order to obtain substantially the same result as would be obtained if the Index had not been discontinued or revised.

(d) The franchise fee specified in this Section shall in no way limit grantee's obligation to compensate City or any private citizen for any damage, claim, expense or loss whatsoever as set forth in this Ordinance.

(e) *Compensation For Repair Work.* Grantee shall pay to the City on demand, the cost of all repairs to public property made necessary by any operation of the grantee under this franchise.

(f) *Compensation For Abandonment or Removal.*

(1) In the event grantee's abandonment of the pipeline with the approval of the City, the grantee shall pay to the City a fee which shall be computed as follows:

Pipesize In Inches	Fee In Dollars Per Lineal Foot
00 - 10	$ 15.00
11 - 18	$ 22.00
over 18	$ 28.00

(2) The fee computed above shall be the minimum fee to be charged the applicant for the privilege of abandoning those facilities in place which the City determines to be in the public interest. Should the City determine that the Construction Cost Index published by McGraw-Hill, Inc. in the Engineering NewsRecord for the last calendar month immediately preceding the effective date of the abandonment application stand at the other than 3,371.49 (which is the Construction Cost Index for January 15, 1981, using prices prevailing during the year 1913, as a base of 100), then the fee to be charged for said abandonment in place shall be increased from the minimum fee established by the City in direct proportion as said index for said calendar month for construction costs exceeds 3,371.49.

(3) If McGraw-Hill, Inc. shall discontinue the publication of a construction cost index using prices prevailing in the year 1913, as a base of 100, and if no transposition table prepared by McGraw-Hill, Inc. is available so as to make those statistics which are then available applicable to the year 1913, then the City shall prescribe a rate of payment which shall, in its judgment, vary from the hereinabove specified minimum rates in approximate proportion, as construction costs then current vary from said Construction Cost Index last published.

Upon this point, such determination by the City shall be final and conclusive.

(4) The City may also specify other conditions to abandonment, including but not limited to, removal as set forth in Section 18 herein. Such conditions shall be fully complied with to the satisfaction of the City before such facilities shall be considered abandoned. Until so abandoned, franchise fee payment shall continue to accrue.

(g) *Interest.* Any payment due from grantee to City under any provision of this Ordinance which is not paid when due shall bear interest at the highest amount allowable by law, but the payment of such interest shall not excuse or cure any default by grantee under this Ordinance. Such interest is separate and cumulative and are in addition to and shall not diminish or represent a substitute for any or all of City's rights or remedies under any other provision of this Ordinance.

SECTION 5. *Insurance.*

Grantee at all times during the term of this Ordinance and until the abandonment of the pipeline shall maintain liability insurance in an amount not less than $20,000,000.00 cover any claim, expense, or loss arising out of the operation, use, maintenance or other privilege exercised under this Ordinance, including grantee's contractual liability to indemnify City. The City, boards and commissioners, its officers, employees, agents and servants shall be named as additional insureds in said policy of insurance for all operations of grantee relating to the operation of said pipeline within the City. Said policy of insurance shall contain the following provisions or endorsements:

(a) The naming of an additional insured shall not affect any recovery to which such additional insured would be

entitled under this policy if not named as such additional insured.

(b) An additional insured named herein shall not be held liable for any premium or expense of any nature on this policy or any extension thereof.

(c) The provisions of the policy will not be changed, suspended, cancelled or otherwise terminated as to the interest of an additional insured named herein without first delivering to City thirty (30) days written notice of such intention.

(d) Any other insurance held by an additional insured shall not be required to contribute anything toward anyloss or expense covered by the insurance provided by this policy.

(e) Grantee shall furnish to City a Certificate of Insurance showing insurance as herein required and if said certificate is not filed, grantee agrees that this Ordinance can be set aside.

SECTION 6. *Surety Bond.*

Within five (5) days after the effective date of this Ordinance, grantee shall file and thereafter at all times during the term of the Ordinance keep on file with the City Clerk a corporate surety bond running to the City, in the sum of $50,000.00, conditioned that grantee shall well and truly observe, fulfill and perform each condition of this Ordinance. In case of any breach of condition of the bond, the whole amount of the sum shall be deemed to be liquidated damages and shall be recoverable from the principal and sureties of the bond. If said bond is not filed within five (5) days after the effective date of the Ordinance, the Ordinance may be set aside.

SECTION 7. *Maintenance and Repair.*

(a) Grantee shall maintain the pipeline and appurtenances in a good, workmanlike manner and in conformity with all the ordinances, rules and regulations now or

hereafter adopted or prescribed by the City and shall perform any necessary repairs.

(b) Grantee shall conduct maintenance and repair of all pipes and pipelines with the least possible hindrance to the use of the highways for purposes of travel, and as soon as such work is completed, all portions of the highway which have been excavated or otherwise damaged thereby shall be placed in as good condition as the same were before the commencement of such work, to the satisfaction of the City, and any damage or injury suffered by any person by reason of any excavation or obstruction being improperly guarded during said work shall be borne by grantee.

(c) Grantee, upon completing any street opening, shall restore all streets, highways, private and public property to at least as good condition as the same existed in, immediately prior to said opening, and does by this Ordinance, guarantee that the work of restoration shall be good against all faulty workmanship and materials and shall, for a period of one (1) year thereafter, maintain all such road surfaces in as good condition as other portions of said road, not disturbed by said opening.

(d) Grantee shall make such deposits of money or shall file such bonds with the City as may be required to insure satisfaction and completion of all construction activity within public rights of way.

SECTION 8. *Safety Requirements.*

The City Council finds that the public health, safety and welfare require that certain safety requirements be imposed as a condition of granting this franchise. Without these requirements, the City Council finds that granting a franchise would be contrary to the public health, safety and welfare and that the City Council would be required to deny the franchise. As a condition of the City granting this

franchise, grantee shall perform all of the following safety requirements:

(a) *Maps of Pipeline Block Valves and Other Devices.* The grantee will provide the City fire department a map or suitable diagram showing the location along the pipeline of all block valves or other mechanical devices situated along the pipeline so that the fire department can locate each valve or device in order to stop the flow of the pipeline manually.

(b) *Pipeline Operation and Contingency Planning.* The grantee shall provide the City fire department a pipeline operations contingency plan covering all of the following:

(1) The procedures for conducting normal operations and maintenance activities and the approved means to handle abnormal operations and emergencies.

(2) The construction and repair record and for the pipeline.

(3) Its liason procedure with City fire, police, and other emergency authorities for emergency response, including the means of communication and the means of preventing the ignition of vapors released in a pipeline rupture.

(4) The personnel training procedures for firefighters and emergency equipment use.

(c) *Maintenance of Studies.* The grantee shall compile and maintain a study of the pipeline within the boundaries of the City showing all of the following:

(1) Pipeline route through its boundaries.

(2) Populations density along the pipeline route.

(3) Soil and other geologic conditions along the pipeline route

(4) A means of educating and reporting to the public concerning the potential hazards in transporting petroleum by pipeline.

(d) *Specifications.* The pipe, repaired pipe and replaced sections and other components of the pipeline to exist to be placed in streets as franchise property shall be designed, manufactured and installed in accordance with the Pipeline Code. The operating or service pressure for which they are designed will be the maximum non-shock internal pressure that may occur either under conditions of year-round operation of under static conditions with the pipeline filled but no fluid flow.

Steel pipe to be in contact with the ground or in casing across freeways, streets, and storm drains shall be covered with a coating or wrapping and be equipped with a cathodic protection system to minimize corrosion and electrolysis.

(e) *Pressure Limitations.* No point in the pipeline constituting franchise property shall be subject to an internal pressure at any time from any cause whatsoever in excess of that permitted by the Pipeline Code for testing purposes; or except when under pressure test, in excess of either the pressure to which it was referred to in subsection (e) thereof, or 66.6% of the pressure to which it was subject under the previous pressure test conducted pursuant to the provisions of subparagraph (g) hereof. No pressure in the line during surges or other variations from normal operations shall exceed 110 percent of the maximum operating pressure.

(f) *Pressure Tests.* After repair or replacement of any pipe pursuant to the terms of this Ordinance, the affected portion of the pipeline between sectionalizing valves shall be subjected to a pressure test as provided hereof and within the pressure limitations prescribed hereof not more than thirty days after completion of the work; provided,

however, that no such test is required for a minor repair which does not require removal of the pipeline from operation.

The pipeline shall not be operated beyond the expiration of a twelve (12) month period of time following such pressure test thereon.

After a severe earthquake, explosion in close proximity to the pipeline, landslide or other serious earth movement, and other activity that may cause undetected damage where the integrity of the line is in doubt by the grantee, the pipeline shall be subjected to a pressure test as provided hereof and within the pressure limitations prescribed in subsection (f) and hereof not more than thirty days after incident.

After a survey by an inspection pig if some event occurred that gave evidence of pipe damage, the pipeline shall be subjected to the pressure test as provided hereof and within the pressure limitations.

The pressure test shall be a hydrostatic test that conforms to 49 C.F.R Part 195.302(e). Pressure test shall not show an hourly loss, in excess of ten (10) gallons.

The City may prescribe any reasonable test method, witness the entire test procedure, and, during a test or at any other time, measure or ascertain the pressure to which the pipe is subject.

The pipeline authorized by this franchise shall be subjected to a pressure test by the grantee whenever reasonably required by the City.

The grantee shall submit to the City reports of pressure tests made pursuant to the provisions of this franchise, showing the date of test, description of portion of pipeline tested, identified with respect to City street routes, and test data sufficient in detail to permit analysis of test results and determination of compliance with provisions of this Section 8.

(g) *Electro-Magnetic Survey Inspection.* The pipeline shall be subjected to an electro-magnetic survey the complete length of the line within the City boundary. The survey shall be carried out using a magnetic flux type inspection pig or equivalent device.

The pipeline shall not be operated beyond the expiration of a twelve (12) month period of time unless a survey is completed. Subsequent surveys will be dependent upon the results of the initial survey. If minor wall thinning and no serious defects are found, an electro-magnetic survey would not be required until (ten) 10 years after the initial survey. If significant wall thinning and/or other defects are found, the electro-magnetic survey shall be repeated every four years.

The grantee shall submit to the City reports of this electromagnetic survey test pursuant to the provisions of this franchise, showing the data of test, description of portion of pipeline tested, identified with respect to City street routes, and test data sufficient in detail to permit analysis of test results and determination of compliance with provisions of this subsection (h).

(h) *Thickness Measurement.* The grantee shall conduct thickness measurements where there is reason to believe that the pipe wall is being reduced due to external/internal corrosion (*e.g.*, the effect of solid particles in the transported fluid).

(i) *Leak Detection.* The grantee shall be equipped with a means of leak detection with remote access monitoring of automatic nature and continuous operation. The leak detection system should be at least as good as the leak detection system sensitivity in effect on the line at the present time. The leak detection system or improved version thereof shali provide short-term (i.e. minutes) and long-term (i.e. hourly, daily) leak monitoring and alarms.

(j) *Calibration of Dynamic Model Computer Program.* The grantee shall provide at intervals not exceeding one year, conclusive test verification of the leak detection resolution and leak pinpointing accuracy of dynamic model computer program. The specific test will be dictated by the grantee. The grantee shall submit to the City reports of the calibration.

(k) *Corrosion.* The grantee shall provide at intervals not exceeding six months, conclusive test verification of the condition of sections of the line at casings and in environments (i.e. near water storage, etc.) where increased corrosion is possible.

(l) *Valve Spacing.* A motor operated block vlave north of the San Vicente Reservoir, upstream from the top of the hill, approximately 1000 feet from the reservoir shall be added.

(m) *Valve Operations.* All block valve shall be remotely operated and motor controlled.

(n) *Remote Operation and Display of Valves.* Redundant, remote operation of sectionalizing block valves that are continually visually displayed at the supervisory control room computer display shall be used.

(o) *Chemical Monitoring.* The City reservoir and water wells shall be protected from contamination by frequent chemical monitoring of the hydrocarbon content of all water reservoirs and water wells in the City within 0.3 miles of the pipeline.

(p) *Inspecting Surface Condition on or Adjacent to the Pipeline Right-of-Way.* The grantee shall at intervals not exceeding 1 week, inspect the surface condition on or adjacent to the pipeline right-of-way in the City.

(q) *Leak Location and Pinpointing.* Adequate facilities (such as a portable hydrocarbon detector, passive acoustic monitoring, etc.) shall be provided to pinpoint the leak along

the line after a leak is suspected by remote access monitor of automatic nature, visual observations or other means.

(r) *Pipeline Replacement.* The grantee shall replace the pipeline if it has deteriorated to such a point, in any part, that maximum allowable operating pressure is 80% or less than the test pressure.

(s) *Annual Certification.* The grantee shall annually file with the City a certificate under penalty of perjury that the grantee has complied with all of the requirements of 49 C.F.R. Part 195 and all other applicable federal, state and local regulations including this Section 8.

SECTION 9. *Pipeline Accidents.*

If any portion of any highway shall be damaged by reason of breaks or leaks in any pipe or conduit constructed under this Agreement, grantee thereof shall, at its own expense, repair any such damage and put such highway in as good condition as it was in before such break or leak, to the satisfaction of the City.

SECTION 10. *Indemnification of City.*

(a) Grantee shall indemnify and hold harmless the City, boards and commissions, its officers, employees, agents and servants from and against any and all loss, damages, liability, claims, suits, costs and expenses, whatsoever, including reasonable attorneys' fees, regardless of the merit or outcome of any such claim or suit, arising from or in any manner connected to the activities or work conducted pursuant to the franchise.

(b) Grantee shall indemnify, defend and save harmless the CITY, boards and commissions, its officers, employees, agents and servants from and against any and all claims and losses whatsoever, including reasonable attorneys' fees, accruing or resulting to any and all persons, firms or corporations furnishing or supplying work, services, materials, equipment or supplies in connection with

activities or work conducted or performed pursuant to this Ordinance and arising out of such activities or work, and from any and all claims and losses whatsoever, including reasonable attorneys' fees, accruing or resulting to any person, firm or corporation for damage, injury or death arising out of Grantee's operations.

SECTION 11. *Liability of Grantee.*

Grantee shall be strictly liable for any and all loss or damage to City, its officers, boards and commissions, employees, agents and servants, private parties and property owners in the City caused by the operations, activities or work conducted pursuant to this Ordinance.

SECTION 12. *Relocation of Pipeline Upon City's Request.*

Grantee shall relocate without expense to the City any facilities installed, used, or maintained under this franchise if and when necessary or accommodate the construction of any public street, highway, alley or other public improvement.

SECTION 13. *Emergency Crews and Equipment.*

Grantee shall maintain on a twenty-four (24) hour basis adequate emergency equipment and properly trained emergency crews within a radius of twenty-five (25) miles from any facilities installed or maintained pursuant to this Ordinance, for the purpose of shutting off pressure and flow and cleaning up the spilled contents of such facilities in the event of an emergency resulting from an earthquake, in an act of war, civil disturbance, flood, or other cause. On or before the acceptance date of this Ordinance, grantee shall present to City an emergency plan listing equipment, personnel and procedures to be used in an emergency. Grantee shall immediately inform City of any changes in or revisions of the emergency plan that occur during the term of this Ordinance and shall submit an amended plan to the

City. Grantee shall provide City with a method of instantaneous communication to emergency crew center which shall be to the mutual satisfaction of City and grantee. Grantee shall annually present to City an updated emergency plan listing equipment, personnel and procedures to be used in an emergency and provide City with a method of instantaneous communication to emergency crew center.

SECTION 14. *City's Reserved Rights.*

(a) The granting of this Ordinance or any of the terms or conditions contained herein shall not be construed to prevent to the City from granting over the route herein specified or elsewhere any identical, similar, or other type of franchise to any person, firm, or corporation other than grantee.

(b) The City reserves the right to improve any highway, street, alley or other public place in portion thereof over and within which this franchise is granted, including the widening, change of grade, construction or reconstruction of such highway, street, alley, or other public place or poton. Thereof, and there is further reserved to the City and any political subdivision or district within the City, the right to construct, reconstruct, install, repair and maintain in any such highway, street, alley, or other public place or portion thereof, any public improvement.

(c) The City reserves the right to give the grantee any directions for the maintenance, construction and repair of any pipes and appurtenances as may be reasonably necessary to avoid sewers, water pipes, conduits in other structures lawfully in or under the streets; and before the work of maintenance, construction or repairs of any pipes and appurtenances is commenced, the grantee shall file with the City plans shows the location thereof, which shall be subject to the approval of the City Council. All such

construction shall be subject to the inspection of City Manager and City Engineer and done to his reasonable satisfaction.

(d) Nothing herein shall be deemed to make the City or its boards and commissions, officers, employees, agents or servants of the City responsible or liable to said grantee by reason of the approval of plans for the maintenance, construction, and repair of pipes or appurtenances. The City, by granting this franchise, does not warrant the accuracy of such approval or information as supplied or given to the grantee.

SECTION 15. *Further Construction of Pipeline.*

Any change in the alignment, size, length of pipeline or the throughput of the pipeline shall be deemed a material breach and a forfeiture of the franchise by grantee.

SECTION 16. *Prohibition Against Transfer.*

Grantee shall not assign, hypothecate or transfer this Ordinance or any interest therein directly or indirectly, by operation of law or otherwise without the prior written consent of the City; any attempt to do so without said consent shall be null and void, and any assignee, hypothecatee or transferee shall acquire no right or interest by reason of such attempted assignment, hypothecation or transferee.

SECTION 17. *Forfeiture.*

(a) In the event Grantee fails to comply with or to commence and diligently proceed towards compliance with any instructions of the City or any City officer having authority to so act with respect to maintenance of pipeline or repair of any damage to highways, streets, alleys or other public places, or any other public improvement as defined in Section 8, herein, within three (3) days after the service of written notice on the grantee requiring compliance therewith, then the City may immediately do whatever

work is necessary to carry out the instructions at the cost and expense of the Grantee, which cost, the grantee agrees to pay and shall pay upon demand.

(b) If the grantee of this franchise shall fail, neglect or refuse to comply with any of the provisions of this Ordinance and shall not within ten (10) days after written demand for compliance, begin the work of compliance, or after such beginning shall not prosecute the same with due diligence to completion, then the City may declare this franchise and all rights and privileges forfeited and upon written notice to grantee, this franchise shall be void and the rights of the grantee shall cease. Upon the termination of this franchise, whether by forfeiture or otherwise, the grantee shall be barred from further use of the public streets, alleys, roads, highways, and other public places of said City under this Ordinance.

SECTION 18. *Termination of Franchise.*

(a) At the time of the expiration, forfeiture or other termination of this franchise, or the permanent discontinuance of the use of its facilities, or any portion thereof, grantee shall make written application to the City for authority to either abandon all or a portion of such facilities in place or to remove all or a portion of such facilities. Thereupon the City shall determine whether any abandonment or removal which is thereby proposed may be effected without detriment to the public interest or under what conditions such proposal of abandonment or removal may be safely effected and shall then notify the Grantee according to such requirements as shall be specified in the City's order.

(b) Within ninety (90) days thereafter, grantee shall pursuant to such order of the City: (1) remove, at its sole cost or expense, all or a portion of such facilities or (2) abandon in place all or a portion of such facilities by sealing

and filling the same with either a mixture of cement and sand or rotary mud and "Cypan" in a manner satisfactory to the City and paying the City a sum equal to that set forth in Section 4 herein.

(c) If any facilities to be abandoned in place subject to prescribed conditions shall not be abandoned in accordance with all of such conditions, then the City Engineer may make additional appropriate orders, including if he or she deems desirable, an order that the grantee shall remove all such facilities. On the failure of the grantee to comply therewith, the City may cause said facilities to be removed at the grantee's expense, and the grantee shall pay to the City the actual cost thereof plus twenty (20%) percent for overhead.

SECTION 19. *Cumulative Remedies.*

No provision herein made for the purpose of securing the performance of the terms and conditions of this Ordinance shall be deemed an exclusive remedy, or to afford the exclusive procedure, for the enforcement of said terms and conditions, but the remedies and procedures herein provided, in addition to those provided by law, shall be deemed to be cumulative.

SECTION 20. *Notice.*

All notices, demands, requests, or approvals to be given under this Ordinance, shall be given in writing and conclusively shall be deemed served when delivered personally or on the second business day after the deposit thereof in the United States Mail, postage prepaid, registered, or certified, addressed as hereinafter provided.

All notices, demands, requests, or approvals from Contractor to City shall be addressed to City at:

Santa Monica City Hall
1685 Main Street
Santa Monica, California 90401
Attn: City Attorney

All notices, demands, requests, or approvals from City to Contractor shall be addressed to grantee at:

Shell Oil Company
Operations/Pipelines
West Coast Division
P. O. Box 4848
Anaheim, California 92803

21. *Costs of Litigation.*

If any legal action is necessary to enforce any provision hereof or for damages by reason of an alleged breach of any provisions of this Ordinance, the prevailing party shall be entitled to receive from the losing party all costs and expenses and such amount as the court may adjudge to be reasonable attorney's fees for the costs incurred by the prevailing party in such action or proceeding.

SECTION 22. *Counterparts.*

This Ordinance may be executed in several counterparts, each of which is an original, and all of which together constitute but one the same document.

SECTION 23. *Captions For Convenience.*

The captions herein are for convenience and reference only and are not a part of this Ordinance and do not in any way limit, define, or amplify the terms and provisions hereof.

SECTION 24. *Governing Law.*

This Ordinance has been made and shall be construed and interpreted in accordance with the laws of the State of California.

SECTION 25. *Acceptance of Franchise.*

The acceptance of this franchise by the Grantee must be filed within 10 days after adoption of this Ordinance. Upon the filing of each acceptance, and provided this Ordinance has become effective, all franchise and privileges heretofore granted to the Grantee or its predecessors in interest in respect to the pipeline located in public streets within the City of Santa Monica shall terminate.

SECTION 26. *Execution.*

The Mayor shall sign and the City Clerk shall attest to the passage of this Ordinance. The City Clerk shall cause the same to be published once in the official newspaper within 15 days after its adoption. The ordinance shall become effective 30 days from its adoption.

IN WITNESS WHEREOF the parties hereto have executed this Ordinance on this ______ day of ______ , 1982.

City of Santa Monica

John H. Alschuler
City Manager

Approved as to form:

ROBERT M. MYERS
City Attorney

Shell Oil Company,
A Delaware Corporation

By ________________________________